No. 87-620

(3)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

BARRY KRUPKIN, et al.,
Petitioners,
v.
DOW CHEMICAL CO., et al.,
Respondents.

In re "Agent Orange" Product Liability Litigation

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Question Presented

Whether certiorari should be granted to review the settlement of a unique product liability class action, where the settlement was examined in the light of all relevant circumstances and found by both lower courts to be fair.

Parties Below

The Parties to the proceedings below, as required by Supreme Court Rules 22.1 and 34.1, are the Petitioner, Barry Krupkin, and the Respondents, The Dow Chemical Company, Monsanto Company, Hercules Incorporated, T H Agriculture & Nutrition Company, Inc., Diamond Shamrock Chemicals Company, Uniroyal, Inc. and Thompson Chemicals Corporation.*

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* The parent companies, subsidiaries and affiliates of the corporate parties, as required by Supreme Court Rule 28.1, are:

The Dow Chemical Company, Respondent.

Alamo Land Company, Inc.; Arabian Chemical Company; Compagnie des Services Dowell Schlumberger; Chief Shipping Company; DCU/LB TRUST; Cromarty Petroleum Company Limited; Scotdril Offshore Company; Chimtrade; Vorakim Kimya Sanayi Ve Ticaret A.S.; Transformadora de Etileno S.A.; Dowell Schlumberger Canada Inc.; Fort Saskatchewan Ethylene Storage Limited Partnership; H-D Tech Inc.; MT Partnership; Wabiskaw Explorations LTD.; Haeger and Kaessner Limited; Viopol S.A.; Oronzio de Nora Technologies S.p.A.; Dow Corning Corporation; Dowell Schlumberger Corporation; Dowell Schlumberger Incorporated; El Dorado Terminals Company; Insul/Crete Company, Inc.; ISOPOR—Companhia Portuguesa de Isociantos Ltda.; Ivon Watkins-Dow Limited; Joliet Marine Terminal Trust Estate; M.D. Kasei Limited; Funai Pharmaceuticals Company Ltd.; First Chemical Factoring S.p.A.; Laboratories Industriales Farmaceuticos Ecuatorianos (L.I.F.E.); MDP (Holdings) Ltd.; Metal Mark, Inc.; Fort Saskatchwan Ethylene Storage Corporation; Oronzio de Nora Impianti Elettrochimici S.A., Lugano; Oronzio de Nora Technologies B.V.; Oronzio de

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Nora Technologies S.p.A.; P.T. Pacific Chemicals Indonesia; Pacific Chemicals Berhad; Pacific Plastics (Thailand) Limited; Petroquimica-Dow S.A.; The Cynara Company; Vorakim Kimya Sanayi VE Ticaret A.S.; Zip Pak Incorporated.

Monsanto Company, Respondent.

ACM Services, Inc., Advent Eurofund Limited, Advent-Techno Venture Investment Corp. N.V., Australian Fluorine Chemicals Pty. Limited, Companhia Duasiliera de Dsuirena, Fosbrasil S.A., Hydrocarbon Products Pty. Ltd., K.K. Astro, Invitron Corporation, Kinetek Systems Incorporated, Korag Company Limited, Korsil Company Limited, Limewood Run-Off Limited, Mitsubishi Monsanto Chemical Company, Monsanto Chemicals of India Limited, Monsanto Chemicals (Thailand) Limited, Monsanto (Malaysia) Sendirian Berhad, Nippon Cooper Kabushiki Kaisha, Nippon Fisher Company, Ltd., Nomix Manufacturing Company Limited, NutraSweet AG, Quimica do Triangulo Ltda., Revertex Industries (Aust.) Pty. Limited, Revertex Industries (N.Z.) Ltd., Revinex Australia Limited, Ryowa, K.K., Titan Chemicals Limited, Tsukuba Service Company, Ltd.

Hercules Incorporated, Respondent.

A.C. Hatrick Chemicals Pty. Ltd., A.C. Hatrick, (N.Z.) Ltd., A/S Kobenhavens Pektinfabrik (CPF), A/S Kobenhavens Pektin Fabrik, Abieta Chemie GmbH, AEONIC Systems, Inc., Algas Marinas S.A., Alkyls do Brasil Ltds., Aqualon Company, Austchem Nominees Pty. Ltd., Australian Chemical Holdings Ltd., BHC Laboratories, Inc., Caribbean Lumber Co., Centennial Lumber Company, Ceratonia, S.A., Cesalpinia, S.p.A., Champlain Cable Corporation, Compania Brasil Eira De Productos, Curtis Bay Insurance Co. Ltd., Dawood Hercules Chemical Ltd., Devron Hercules Inc., DIC-Hercules Chemicals Inc., EKC Technology, Inc., Electronic Display Systems, Inc., EPICOR Laboratories, Inc., Genu Products Canada Limited, Genu Products Philippines Inc., Hafimij B.V., Hercochem (H.K.) Ltd., Hercofina Europe V.O.F., Hercofina Joint Venture, Hercoform Incorporated, Hercoform Marketing Inc., Hercules Aerospace Espana, S.A., Hercules Andino S.A., Hercules Canada, Inc., Hercules Chemical Corporation, Hercules Chemicals Investments Pty. Ltd., Hercules Chemicals B.V., Hercules Credit Inc., Hercules de Centro America S.A., Hercules Defense Electronic Systems, Inc., Hercules Do Brasil Productos

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Quimicos Ltd., Hercules Far East Ltd., Hercules Finance Co. Ltd., Hercules France S.A., Hercules GmbH, Hercules (Holdings) Ltd., Hercules International Trade Corporation, Hercules Islands Corporation, Hercules Kemiska Aktiebolag, Hercules Ltd., Hercules Overseas Corporation, Hercules Taiwan Co. Ltd., Hercules Trading Corporation, Herdillia Chemicals Ltd., Hersean PTE Ltd., Himont, Belgium, Himont, Canada, Himont Incorporated, Himont, Italia, Himont U.S.A., Inc., Holden Vale Mfg. Co. Ltd., Infinetics, Inc., Inmobilaria Petrocel, Intermarine USA, Mathersa Industries Quimicas, S.A., MICA Corporation, MICA TEK Sales, Inc., MICRON Sales Inc., Moplefan N.V., Moplefan S.p.A., Moplefan (U.K.), Oy Hercofin Ab, NFW (Australia) Pty. Ltd. PFW (Deutschland) B.V. & Co. Aromen, PFW (Leasing) B.V., PFW Ltd., PFW (Nederland) B.V., PPD Hercules, Inc., P.T. Hercules Mas Indonesia, Patex Chemie GmbH, Etichem S.A., Petrocel S.A., Petroleum Fluids, Inc., Polo Industria E. Commercia Ltda., Pomosin AG, Quimica Hercules De Columbia Limited, Quimica Hercules S.A. de C.V., Quimproc, S.A., Rika Hercules Inc., Rohe, S.A. Ross Pulp & Paper, Inc., Semi-Gas Systems, Inc., Simmonds Industries Inc., d/b/a Cooperative Industries Inc., Simmonds Precision AG, Simmonds Precision Engine Systems, Simmonds Precision Ltd., Simmonds Precision Motion Controls, Inc., Simmonds Precision NV, Simmonds Precision Products Inc., St. Croix Petrochemical Corp., Sumika-Hercules Co. Ltd., Taiwan Hercules Chemicals, Inc., Taloquimia, S.A., Teratec Systems Inc., Texas Alkyls Belgium, S.A., Texas Alkyls Inc.

T H Agriculture & Nutrition Company, Inc., Respondent.

North American Philips Corporation.

Diamond Shamrock Chemicals Company, Respondent. The parent company, subsidiaries (except wholly-owned subsidiaries) and affiliates of Occidental Electrochemicals Corporation (formerly named Diamond Shamrock Chemicals Company) are as follows:

Occidental Petroleum Corporation, Occidental Petroleum Investment Co., Occidental Chemical Holding Corporation, Oxy-Diamond Alkali Corporation, Canadian Occidental Petroleum Ltd., Occidental Chemical Corporation, Carboclora S.A. Industries Quimicas, Korea Pottasium Chemical Co. Ltd., Thai Diamond Shamrock Chrome Limited, Thai Diamond Shamrock Limited, Sanital Comercio e Empreendimentos, Petway Products Distributors, Inc., International Ore & Fertilizer Belgium SA, Oxy Metal Industries (France)

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SA, OxyTech Systems, Inc., Plasticos y Derivados Compania Anonima, Plastiflex, C.A., Malharia Industrial do Nordeste SA, Industries Oxy S.A., Sumitomo Durez Co. Ltd., Industries Quimica de Portuquesa SA, Mississippi Chemical Corporation, Occidental Minerals (Philippines) Inc., Tororo Industrial Chemicals & Fertilizers Limited, Trans-Jeff Chemical Corporation, Distribuidora y Exportadora Udylite, S.A.

Uniroyal, Inc., Respondent, was dissolved pursuant to the laws of the State of New Jersey.

Thompson Chemicals Corporation, Respondent.

Wm. T. Thompson Co.

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BRIEF IN OPPOSITION

Respondents The Dow Chemical Company, Monsanto Company, Hercules Incorporated, T H Agriculture & Nutrition Company, Inc., Diamond Shamrock Chemicals Company, Uniroyal, Inc. and Thompson Chemicals Corporation, respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Second Circuit affirming the approval of the class action settlement in the *Agent Orange* multidistrict litigation.

Opinions Below

The opinions below are adequately set forth in the Petition with the following additions:

The opinion of the United States Court of Appeals for the Second Circuit dated April 21, 1987 reversing the district court's order which refused to set aside class counsel's fee agreement is reported at 818 F.2d 216 (2d Cir. 1987) and is reprinted in the Respondents' Appendix annexed hereto pp. A1-A21.

The Memorandum and Order of the United States District Court for the Eastern District of New York denying the motion to set aside class counsel's fee agreement is reported at 611 F. Supp. 1452 (E.D.N.Y. 1985) and is reprinted in the Respondents' Appendix annexed hereto pp. A22-A48.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Constitutional Provisions, Statutes and Rules

1. The Fifth and Fourteenth Amendments to the United States Constitution.

2. Fed. R. Civ. P. 23(e), pertaining to settlement of class actions, provides as follows:

> DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Statement of the Case

Petitioner, a member of the class of veterans who allegedly were injured by exposure to Agent Orange in Vietnam, seeks a writ to have this Court engage in a detailed review of the totality of circumstances relevant to, and to overturn as unfair, a $180 million settlement of the class action against the makers of Agent Orange, notwithstanding that the settlement was approved by both lower courts after a comprehensive analysis of precisely those same circumstances.

The *Agent Orange* litigation began in late 1978 and early 1979. By the time of settlement in May 1984, more than 500 individual and representative actions involving more than 11,000 named plaintiffs had been filed in federal and state courts across the country. The state actions were removed to federal court and, by orders of the Panel on Multidistrict Litigation, consolidated for all pretrial purposes in the United States District Court for the Eastern District of New York with all other *Agent Orange* actions.

In or about September 1983, after the elevation of the original transferee judge to the court of appeals, Chief Judge Jack B. Weinstein succeeded as transferee judge in the multidistrict proceeding. At a conference with counsel in October 1983, Judge Weinstein gave notice that he intended to enter an order formally certifying an appropriate case as a class action on behalf of all Vietnam veterans and their family members who were injured by the veterans' exposure to Agent Orange in Vietnam; and that trial of that action would begin on May 7, 1984. The court directed plaintiffs' attorneys to select as bellwether claims for trial on that date their ten best cases. JA 2585;* *see* 597

* Citations preceded by JA are to the Joint Appendix filed in the court of appeals.

F. Supp. 740, 752 (App. 157a).* In December 1983, the court entered a formal order of class certification. 100 F.R.D. 718, 729 (App. 477a).

Negotiation of the Settlement

Approximately two months before the scheduled start of trial on May 7, 1984, court-appointed class counsel (the nine member Plaintiffs' Management Committee) initiated settlement discussions and solicited the participation therein of the district court. JA 17192-95. With the consent of all parties, the district court agreed to participate, *see* JA 17194-95, 3804-05, and in April 1984, the court appointed three settlement masters to oversee settlement discussions, *see* 597 F. Supp. at 752-53, 762 (App. 157a, 179a); JA 6627-28, 6735-36.

Class counsel thereafter made an initial settlement demand of $650 million; defendants offered nothing. JA 11515-16. After weeks of discussion, seven days before trial, class counsel had reduced their demand to $250 million. *See* JA 13614-15. As the trial date approached, the district court directed that, on the weekend before the Monday trial, representatives of the parties attend courthouse settlement discussions conducted by the settlement masters, and gave notice that it too would be available to the parties on both days at that location.

Early in the weekend of May 5 and 6, defendants made an initial offer of settlement of $100 million. *See* JA 11106. The parties spent the remainder of the weekend bargaining between the amounts of $100 million and $250 million until agreement was reached in the early morning of May

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*Citations preceded by App. are to the Single Appendix filed in this Court by the petitioners in *Lombardi* v. *Dow Chemical Co., et al.*, No. 87-436.

7, 1984 on $180 million, and on the other terms and conditions of settlement. A stipulation of settlement was entered that day, and a detailed settlement agreement was signed and submitted to the court on June 11, 1984. JA 6685-703. Class counsel, including Benton Musslewhite, Petitioner's counsel of record herein and a signatory to the agreement, unanimously recommended approval of the settlement to the district court. 597 F. Supp. at 760 (App. 174a); JA 11512-13.

The District Court's Evaluation of the Settlement's Fairness

a. *Settlement Notice and Fairness Hearings*

On June 11, 1984, the district court ordered that notice of the proposed settlement be given by mail and by various forms of publication. 597 F. Supp. at 866-67 (App. 409a-11a). The notice described the litigation and settlement, announced a schedule of fairness hearings, and provided claims information. It also included a copy of the settlement agreement and a claims form. *Id.* at 867-75 (App. 412a-28a); JA 6708-31. A separate notice was directed to veterans who opted out of the class inviting them to rejoin, and many rejoined the class. 597 F. Supp. at 875-76 (App. 428a-40a); JA 6732-34, 14725-28.

In August 1984, the district court reviewed hundreds of written communications from veterans and considered the views of nearly 500 witnesses during 11 days of fairness hearings in five different cities. 597 F. Supp. at 748, 764 (App. 148a, 184a).

b. *Preliminary Approval by the District Court*

On September 25, 1984, the district court filed a lengthy opinion in which it preliminarily approved the settlement as fair, reasonable and adequate to the class, and found

that the negotiation process was proper and that the settlement was the result of arm's length negotiations. The weaknesses in plaintiffs' case and the strength of defendants' defenses were decisive factors supporting the settlement. *Id.* at 775, 799, 816 (App. 207a, 256a, 296a).

Specifically, the court found:

— Plaintiffs' scientific and medical evidence on "general causality . . . lack[ed] sufficient probative force . . . to permit a finding of general causality." *Id.* at 782-83 (App. 223a);

— The ailments allegedly suffered by plaintiffs do not occur in the Agent Orange exposed population with greater frequency than in the population at large. *Id.* at 819 (App. 302a); *see* 611 F. Supp. 1223, 1239 (App. 518a);

— Epidemiological evidence established that "no *individual plaintiff* would be able to prove that his or her particular adverse health effects are due to Agent Orange exposure." 597 F. Supp. at 748 (App. 146a) (emphasis in original); *see id.* at 833-43 (App. 334a-55a);

— "The government contract defense in this case is powerful," *id.* at 799 (App. 256a), and "there is a substantial probability that defendants would prevail" on that defense at trial, *id.* at 747 (App. 146a). *See id.* at 795, 843-50 (App. 247a, 355a-72a);

— Substantial uncertainty exists as to the substantive law applicable to plaintiffs' liability claims, and repeated trials and appeals were almost a certainty. *Id.* at 749 (App. 149a);

— Many plaintiffs' claims were barred by the applicable statute of limitations. *Id.* at 748, 800-16 (App. 146a, 257a-96a); and

— Plaintiffs "conceded [the] inability of any veteran to identify the manufacturer of the herbicide to which he was exposed." *Id.* at 819 (App. 301a-02a); *see id.* at 748, 842 (App. 146a, 355a).

With regard to the negotiation process, the court found:

— The district court "had closely followed the settlement negotiations." *Id.* at 760 (App. 174a);

— The negotiations had been conducted at arm's length by class counsel who were able and experienced. 611 F. Supp. 1296, 1304, 1331-34;

— There was a history of vigorous prosecution of the litigation. 597 F. Supp. at 746, 750, 757-58 (App. 143a, 150a-51a, 167a-70a);

— The status of discovery on the eve of trial assured that class counsel were aware of the relative strengths and weaknesses of their case. *Id.* at 760 (App. 174a);

— Every member of class counsel had been involved in the intensive settlement negotiations. *Id.*; and

— The negotiations were "observed by Special Masters accountable to the court insuring against any selling out of the class for the benefit of insiders." *Id.* at 762 (App. 179a).

The court made its preliminary approval of the settlement subject to hearings on attorneys' fees and preliminary consideration of plans for distribution. *Id.* at 862 (App. 399a).

c. ***Class Counsel's Fee Sharing Agreement***

The court directed that applications for attorneys' fees be submitted to the court by the end of August 1984.

611 F. Supp. 1452, 1454 (Resp. App. A24).* Class counsel submitted a joint fee application, which disclosed to the court for the first time an agreement concerning the allocation of attorneys' fees among the members of class counsel. *Id.* (Resp. App. A24-25). Pursuant to the fee sharing agreement, as revised, six members of class counsel were to receive a three-fold return of funds advanced by them to maintain the litigation. *Id.* (Resp. App. A25).

The district court carefully examined the agreement and its "theoretical incentive to settle early," *id.* at 1461 (Resp. App. A40), and found, based on its "direct observation of counsel, the litigation and settlement negotiations, [that] there is no reason to believe that the existence of [class counsel's] fee-sharing agreement had any appreciable untoward effect on the decision to settle." *Id.* (Resp. App. A41). The court declined to invalidate the agreement, *id.* at 1464 (Resp. App. A48), but determined that the "quasi-public" nature of class actions required that all future internal fee allocations among class counsel be reported to the court at their inception, *id.* at 1462-64 (Resp. App. A44-48). The court ordered that the local rules of the district be amended accordingly. *Id.* at 1464 (Resp. App. A48).

d. *The Distribution Plan*

In its order preliminarily approving the settlement, the district court authorized Special Master Kenneth R. Feinberg to solicit proposals for distribution of the settlement proceeds, and established the Agent Orange Advisory Board to assist the Special Master. 597 F. Supp. at 860 (App. 395a). In November 1984, the Special Master and

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* Citations preceded by Resp. App. are to the Appendix annexed hereto.

the Board held meetings with and reviewed submissions from a number of interested persons, including class counsel, various individual plaintiffs' counsel and veterans' organizations. JA 13309-15; *see* Doc. 4563.*

Based on the work of the Advisory Board, Special Master Feinberg submitted to the court on February 27, 1985, a Report Pertaining to the Disposition of the Settlement Fund. JA 13308. The court held a hearing on the report on March 5, 1985 at which more than 40 witnesses appeared. *See, e.g.*, JA 14327. In May 1985, class counsel submitted objections to the report as well as an alternate distribution plan. Doc. 6109.

On May 28, 1985 the district court promulgated a plan for the distribution of the settlement fund which was largely that of the Special Master. The court rejected class counsel's proposed plan, which provided compensation only for class members with specified diseases. It reasoned that "no substantial evidence of causality exists as between . . . Agent Orange exposure and any given disease or medical problem . . . ." 611 F. Supp. 1396, 1408 (Pet. App. I at 42).** Under the court's plan, seventy-five percent of the settlement fund was to be paid to class members for nontraumatic death or total disability of veteran class members who were exposed to Agent Orange. *Id.* at 1410 (Pet. App. I at 53-54). Most of the remaining twenty-five percent was allocated to endow an independent foundation, to be governed by a court-appointed board of directors consisting primarily of Vietnam veterans, and to fund projects and services that would benefit the entire class. *Id.*

* Citations preceded by Doc. are to materials on record in the district court.

** Citations preceded by Pet. App. are to the Appendix submitted with this Petition.

On June 18, 1985 the court modified its January 7, 1985 order awarding attorneys' fees and expenses to class counsel and other plaintiffs' attorneys. On July 9, 1985, a final judgment was entered pursuant to Fed. R. Civ. P. 54(b), approving the settlement as fair, reasonable and adequate. Finally, on July 31, 1986 the district court entered a final judgment directing that the settlement fund be distributed in accordance with the court's May 28, 1985 order.

The Court of Appeals' Determinations on the Fairness of the Settlement, Its Negotiation and Distribution

a. *Fairness of the Settlement*

Various class members objected to the settlement and appealed. Upon review, the court of appeals also concluded that the settlement was fair, reasonable and adequate, and affirmed. 818 F.2d 145, 170-74 (App. 730a-38a). It noted that "pervasive factual and legal doubt . . . surrounds the plaintiffs' claims," *id.* at 149 (App. 681a), and determined, among other things:

— "[T]he weight of present scientific evidence does not establish that Agent Orange caused injury to personnel in Vietnam." *Id.* at 151 (App. 687a); *see id.* at 172 (App. 733a);

— "[T]he military contractor defense absolved [defendants] of any liability," *id.* at 151 (App. 687a); the government had as much knowledge as the defendants of the dangers of dioxin and the defendants did not breach any duty to warn the government since the alleged hazard is "wholly speculative" in light of the lack of scientific and medical proof of causation. *Id.* at 173-74 (App. 737a-38a);

— Plaintiffs faced substantial difficulty in proving details of exposure to Agent Orange since the relevant events occurred many years ago and "exposure through ingestion of water or food is a matter of considerable speculation." *Id.* at 173 (App. 736a);

— Plaintiffs faced "formidable legal problems in establishing liability," because the "substantive law of product liability varies from state to state, and the question of which state's law would apply to a particular case is not easily answered." *Id.* at 173 (App. 736a);

— Many plaintiffs' claims would be barred by the applicable statute of limitations. *Id.* (App. 737a);

— It is "impossible to attribute the exposure of an individual to Agent Orange to the product of a particular company." *Id.;* and

— Uncertainty existed whether plaintiffs could establish liability under their various legal theories. *Id.*

The court concluded "that all the plaintiffs in this litigation faced formidable hurdles. The settlement was therefore reasonable." *Id.* at 174 (App. 738a).

b. *Negotiation Process, Post-Settlement Procedures and Distribution Plan*

The court of appeals also upheld the district court's findings that the process of negotiations had been aboveboard and non-collusive, and that the post-settlement procedures employed by the court were in accord with settled law. *Id.* at 169-70 (App. 729a-30a).

In all but one respect, the court of appeals also affirmed the distribution plan, determining that it was reasonable and holding that the district court "was not obligated to adopt a plan [suggested by class counsel] that conformed

to a theory of the relationship between Agent Orange and certain diseases that has little or no scientific basis." 818 F.2d 179, 183 (Pet. App. II at 16). The court overturned only that part of the plan intended to establish a class assistance foundation. It reasoned that distribution of any settlement proceeds to a largely independent foundation was improper, and that greater supervision by the court was required. *Id.* at 185-86 (Pet. App. II at 26-28). It said, however, that on remand the district court could provide for the distribution of this portion of the fund by "designat[ing] in detail [class assistance] programs and provid[ing] for their supervision." *Id.* at 186 (Pet. App. II at 30).

Finally, the court of appeals rejected an attack on the settlement based on class counsel's fee sharing agreement. The court concluded that, in light of "the grave weaknesses in plaintiffs' case," class counsel's fee sharing agreement "does not affect the instant settlement." 818 F.2d at 174 (App. 738a). In a separate opinion, the court did invalidate the agreement on the ground that it created impermissible incentives to settle early, and directed that class counsel's fees be distributed in accordance with the district court's fee awards. 818 F.2d 216, 218, 223-24 (Resp. App. A3, A15-16).

Reasons for Denying the Writ

Petitioner in this unique product liability class action seeks a writ to review the adequacy of the settlement, the propriety of the negotiation process and the correctness of certain post-settlement procedures. The writ should be denied for three equally sufficient reasons.

First, Petitioner fails to identify a single pertinent conflict in the circuits or with any decision of this Court. *See* Sup. Ct. R. 17.

Second, absent such a conflict, the Petition seeks nothing more than *de novo* factual review by this Court of the reasonableness of the settlement and the merits of plaintiffs' claims. But "jurisdiction [is] not conferred upon this [C]ourt merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co.* v. *Coty,* 262 U.S. 159, 163 (1923); *see Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 74 (1955). This Court confirmed only recently that appellate courts must "rely primarily on the sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in the light of all the relevant circumstances." *Evans* v. *Jeff D.,* 475 U.S. 717, 106 S. Ct. 1531, 1545 (1986). And such a district court appraisal may not be disturbed absent " 'a clear showing the District Court has abused its discretion'." 818 F.2d at 171 (App. 731a) (quoting *City of Detroit* v. *Grinnell Corp.,* 495 F.2d 448, 455 (2d Cir. 1974)); *see Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 424 (1975); *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395 (1948).

The district court here scrutinized the settlement in light of each of the nine factors set out in *City of Detroit* v. *Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir. 1974); *see* 597 F. Supp. at 761-62 (App. 177a-78a), giving particular emphasis to "the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement," *West Virginia* v. *Chas. Pfizer & Co.,* 440 F.2d 1079, 1085 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971); *see Carson* v. *American Brands, Inc.,* 450 U.S. 79, 88 n.14 (1981). It also evaluated the settlement negotiations to insure that the process had been aboveboard, at arm's length and non-collusive, and to insure that the interests of all class members had been adequately considered. 597 F. Supp. at 762 (App. 179a).

The court in a lengthy opinion then detailed a series of factual findings that formed the basis for its conclusion that the settlement was fair, reasonable and adequate to the class. Those findings and the district court's ultimate conclusions were approved by the court of appeals. *See, e.g.*, 818 F.2d at 171 (App. 733a) (the district court's "opinion sets out the various weaknesses of plaintiffs' case in great and persuasive detail"). In such circumstances, certiorari is unwarranted. *See, e.g., Rogers* v. *Lodge,* 458 U.S. 613, 623 (1982) ("this Court has frequently noted its reluctance to disturb findings of fact concurred in [as here] by two lower courts").

Third and last, the *Agent Orange* class action litigation is " '*sui generis*' . . . involving an extraordinary constellation of facts, parties and pleadings." 725 F.2d 858, 860 (App. 669a) (quoting *In re "Agent Orange" Product Liability Litigation,* 635 F.2d 987, 995 (2d Cir. 1980) (Feinberg, C.J., dissenting), *cert. denied,* 454 U.S. 1128 (1981)). Even if the Petition could somehow be read to raise an issue otherwise worthy of the Court's attention, resolution of that issue would have acutely limited precedential value. In such circumstances, review by the Court is unwarranted. *See Milliken* v. *Bradley,* 433 U.S. 267, 298 (1977) (Powell, J. concurring) (writ improper given "unique circumstances" of case); *Rudolph* v. *United States,* 370 U.S. 269, 270 (1962) ("review would be of no importance save to the litigants themselves").

The writ should be denied.

I.

No Writ Should Issue to Review a Class Action Settlement Approved by Two Lower Courts Applying Concededly Correct Legal Principles and Based on Well-Founded Factual Determinations.

Petitioner contends that a writ should issue because the settlement was "grossly inadequate" (Pet. 54) and opposed by a majority of the class (Pet. 51); because the lower courts incorrectly assessed the merits of plaintiffs' case, specifically with regard to proof of causation and the viability of the military contractor defense (Pet. 55-62); and because the district court unilaterally altered the settlement agreement (Pet. 62).* The contentions are not only unfounded, but redetermining them would necessarily engage the Court in *de novo* factual review. In such circumstances, certiorari is inappropriate.

A. Medical Causation

The central reality of this case is that even today, some 15-20 years after the fact, the scientific and medical evidence fails to establish that personnel in Vietnam were injured by exposure to Agent Orange. The district court reached this conclusion after an extensive and detailed an-

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* Petitioner also seeks review of the class certification order (Pet. at 35-39). His arguments attacking class certification fail totally to recognize that no trial of causation, liability, damages, or any other issue in a "mass accident" context occurred below. Rather, all claims were settled, and the issue decided below was not whether plaintiffs' claims *could have been tried* effectively as a class action, but whether the settlement before trial was fair and reasonable. *See, e.g., Officers for Justice* v. *Civil Serv. Comm'n,* 688 F.2d 615, 633 (9th Cir. 1982), *cert. denied,* 459 U.S. 1217 (1983). Other reasons why Petitioner's request for a writ to review the class certification issues should be denied are set forth in the brief for Respondents in Opposition to the Petition in *Pinkney* v. *Dow Chemical Co.,* No. 87-437.

alysis of the applicable scientific and medical literature. 597 F. Supp. at 775-95 (App. 207a-47a); *see* 611 F. Supp. at 1230-34 (App. 498a-507a) (dismissing the claims of the *Agent Orange* opt-outs). As the district court observed, the logical and practical difficulty with plaintiffs' claims is that "all of the ailments and conditions class members allegedly suffer from, with the possible exception of chloracne, are not unique to Agent Orange or dioxin exposure and occur in the population at large," 597 F. Supp. at 819 (App. 302a), from a multitude of known and unknown etiologies, *id.* at 783, 817 (App. 223a, 296a). The record contains no evidence that the incidence of any of these diseases among the Agent Orange exposed population is greater than in the general population not exposed, or that establishes a causal connection between exposure to Agent Orange and any of the alleged adverse health effects. *Id.* at 782, 787-89, 817 (App. 221a, 231a-37a, 297a); 611 F. Supp. at 1239 (App. 518a).

The court of appeals agreed, determining that "[t]he weight of present scientific evidence thus does not establish that personnel serving in Vietnam were injured by Agent Orange." 818 F.2d at 172 (App. 733a). Both the Veterans Administration and Congress have reached identical conclusions. *See* 611 F. Supp. at 1234 (App. 506a) (citing H.R. Rep. No. 98-592, 98th Cong., 2d Sess. 7, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4449, 4451); 38 C.F.R. § 3.311a(4)d.

Contrary to Petitioner's claim (Pet. 60-62), the district court did not unequivocally hold that medical causation in toxic tort cases can never be established without the use of epidemiological studies. Rather, the court observed that in the face of a number of "sound" and reliable epidemiological studies that address the effect of Agent Orange exposure on veterans' health and that furnish no support

for plaintiffs' claims, plaintiffs at trial would likely have suffered a directed verdict against them had they relied only on questionable studies concerning animal laboratory experiments and industrial accidents. 597 F. Supp. at 782-83 (App. 223a); 611 F. Supp. at 1231 (App. 499a).

Moreover, although Petitioner asserts that plaintiffs possessed "strong evidence of exposure" (Pet. 29), both lower courts found otherwise. The "events in question occurred many years ago, and exposure through ingestion of water or food is a matter of considerable speculation." 818 F.2d at 173 (App. 736a). The district court observed prophetically that "[n]o test . . . is decisive in proving exposure to Agent Orange, partly because . . . 'all of us have probably been exposed to dioxin at some time'." 597 F. Supp. at 782 (App. 222a-23a). A recently published study by the Centers for Disease Control indeed confirms that the levels of dioxin in the blood serum of approximately 700 selected Vietnam veterans were within the low "background" levels of the United States civilian population generally. Centers for Disease Control, *Serum Dioxin in Vietnam-Era Veterans—Preliminary Report,* 36 Morbidity and Mortality Weekly Reports 470 (1987). The veterans studied were selected based on their service in a military region known to have had a high number of defoliation missions. *Id.* at 471.*

The fact that there are more than 240,000 claimants against the fund does not demonstrate, as Petitioner con-

* Petitioner's description of a recent Veterans Administration mortality study (Pet. 29 n.17A) is misleading, and his suggestion that the study provides proof of plaintiffs' causation claims is false. The approximately 25,000 deceased Army and Marine Vietnam veterans who were the subject of that study did not exhibit an overall excess of cancer when compared to their counterparts who did not serve in Vietnam.

(footnote continued on following page)

tends, that the $180 million settlement is "grossly inadequate on its face." (Pet. 25.) As the lower courts observed, "the existence of such a large number of claimants proves nothing," 818 F.2d at 171 (App. 732a), and has "little bearing on the question of how many claims have any merit." 611 F. Supp. at 1401 (Pet. App. I at 9-10). Many veterans appear to have filed claims "whether or not anything was wrong with them and whether or not any problems they may have could conceivably be related to Agent Orange exposure." *Id.; see* 818 F.2d at 171 (App. 732a). The settlement was approved as fair in principal part because of the "grave weaknesses" in plaintiffs' claims. 818 F.2d at 174 (App. 738a). Those weaknesses are unaffected by the aggregate number of those who choose to file a claim.

B. Military Contractor Defense

Both lower courts found that in the facts of this case the military contractor defense was a powerful one that provided the class with a strong reason for settlement. 818 F.2d at 173-74 (App. 737a-38a); 597 F. Supp. at 799 (App. 256a). The district court concluded that had the issue been put to a jury, "there is a substantial prob-

(footnote continued from preceding page)

The Marine subgroup of the study population did exhibit a statistically significant increase in mortality from lung cancer and non-Hodgkin's lymphoma. But no exposure data on individual veterans were available and, accordingly, the study did not investigate possible etiologic factors for those malignancies of greater incidence. The study did note, however, that dapsone, an anti-malarial drug, has been shown to cause lymphomas in laboratory animals; that dapsone was given mainly to troops stationed in I Corps; and that most of the Marines in Vietnam served in I Corps. Veterans Administration, Proportionate Mortality Study of Army and Marine Corps Veterans of the Vietnam War (1987) (unpublished; available from VA Office of Environmental Epidemiology, Washington, D.C. 20006-3868).

ability that defendants would prevail." 597 F. Supp. at 747 (App. 146a). In the court of appeals' view, the defense would have presented plaintiffs with "a final and . . . impossible, hurdle to surmount." 818 F.2d at 173 (App. 737a).

Further, the strength of the defense here neither derives from, nor is dependent upon, any particular formulation of its elements. Rather, its power in this case is a corollary of the fact that, "[e]ven today, the weight of present scientific evidence does not establish that Agent Orange injured personnel in Vietnam, even with regard to chloracne and liver damage." 818 F.2d 187, 190 (App. 755a). As the court of appeals explained in approving the settlement:

> [W]e act on our belief that defendants clearly did not breach any duty to inform the government of hazards relating to Agent Orange. First, we agree with Chief Judge Weinstein that a reasonable trier of fact would have to have found that during the time when the defendants had a duty to inform the government of known hazards, the government had as much knowledge as the defendants of the dangers of dioxin, then relating largely to chloracne and a rare liver disease. . . . Second, we believe that the military contractor defense shields defendant contractors from liability where the hazard is wholly speculative. Even if this were a case in which causation was now clear and the issue was whether the hazard was known when Agent Orange was sold to the government, the plaintiffs would have difficulty establishing a breach of a duty to inform. Establishing such a duty on the facts here is impossible, however. In the light of hindsight, some 15 to 20 years after the fact, the weight of present scientific evidence does not establish that personnel in Vietnam were injured by Agent

> Orange, and there cannot have been a breach of an earlier duty to inform the government of known hazards.

818 F.2d at 173-74 (App. 737a-38a).

Here, of course, the class claims were settled, not tried. No jury was instructed on the military contractor defense, much less asked to make findings with respect to it. Nor did a circuit court overturn a plaintiff's verdict on the basis of the defense, as in *Boyle* v. *United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986), *cert. granted,* 107 S. Ct. 872 (1987). Indeed, as of the May 7, 1984 settlement date the district court here had yet to publish its view of the form of the defense it later said it would have applied had the case gone to trial. *See* 597 F. Supp. at 847-50 (App. 364a-72a). The absence at settlement of a precise formulation of the defense, and of any definitive appellate ruling thereon, created uncertainty, making settlement "more desirable." *Id.* at 850 (App. 371a-72a).

More important here, perhaps, is that in the absence of sufficient evidence of causation, no *Agent Orange* plaintiff could have succeeded at trial on any claim of personal injury. To say, then, that defendants would probably have prevailed at trial on the military contractor defense is perhaps simply the obverse of saying that plaintiffs could not have met their burden of establishing that defendants' products had caused them harm and that defendants had breached some duty owed to them. In the circumstances, it is not surprising that the court of appeals held, in affirming the grant of summary judgment against the *Agent Orange* opt-outs, that it was not necessary to define the precise contours of the military contractor defense because "under any formulation, and regardless of which party bears the burden of proof, the defendants here were en-

titled to summary judgment." 818 F.2d at 192 (App. 761a).

This Court's decision to review the application of the military contractor defense in *Boyle* v. *United Technologies Corp., supra,* provides no reason to grant the writ here. Whatever the Court's pronouncements in *Boyle* regarding the existence and elements of the military contractor defense, the medical and scientific evidence in this case will remain unchanged. And it is that evidence that served as the principal predicate for approval of the settlement by both courts below. Moreover, the military contractor defense is only one of numerous reasons both lower courts approved the settlement as fair. Petitioner's claim that the Second Circuit's approval of the settlement rests "solely" on the ground of the military contractor defense is frivolous. (Pet. 32). The Second Circuit noted with obvious approval that the district court's "opinion sets out the various weaknesses of plaintiffs' case in great and persuasive detail." 818 F.2d at 171 (App. 733a). The writ should be denied.

C. Alleged Class Opposition

Petitioner claims that the settlement was vehemently opposed by "a great majority of the class," thus warranting review by this Court. (Pet. 51). The claim is unsupported by the Record and premised solely on the self-serving estimates below of Petitioner's attorneys in this proceeding (Pet. 24 n.16). While the majority of the approximately 1,000 class members who made their views known to the court opposed the settlement, the responses were sharply divided. 597 F. Supp. at 761, 764-65 (App. 175a-76a, 183a-85a). More important, only a fraction of one percent of the class was heard from; "there was an overwhelmingly large silent majority," *id.* at 761 (App. 175a), that "remains inscrutable," *id.* at 775 (App. 207a). Many of those

who did object lacked "a full appreciation of the case's legal and factual problems and the mechanics of mass tort litigation." *Id.* at 759 (App. 172a).

Moreover, opposition to a settlement among members of the class "cannot serve as an automatic bar to a settlement that a district judge . . . determines to be manifestly reasonable." *TBK Partners, Ltd.* v. *Western Union Corp.*, 675 F.2d 456, 462 (2d Cir. 1982). As the district court observed, class members "must, in the ultimate analysis, depend upon the court's impartiality and judgment." 597 F. Supp. at 761 (App. 176a). This view is consistent with settled law, including the cases relied upon by Petitioner. (Pet. 52-53).

D. No Unilateral Alteration of the Settlement Agreement

Petitioner's claim that the district court unilaterally altered the settlement agreement is incomprehensible. (Pet. 62-63). The settlement agreement contained no provisions regarding the content of the distribution plan. From defendants' point of view, the distribution plan was a matter primarily for the class, its attorneys and the court. As the court of appeals observed, the district court "was not obligated to adopt a plan [suggested by class counsel] that conformed to a theory of the relationship between Agent Orange and certain diseases that has little or no scientific basis." 818 F.2d at 183 (Pet. App. II at 16). Given the lack of scientific knowledge sufficient to provide a factual basis for choosing or excluding any particular disease, the plan adopted by the district court was fair and reasonable, and the court of appeals so held. *Id.* at 184 (Pet. App. II at 19).

II.

Petitioner's Attack on the Process of Negotiations Raises Only Issues of Fact That Were Twice Resolved in Respondents' Favor Below and Warrant No Review.

Petitioner seeks a writ to review the process of negotiations. He contends that the $180 million settlement was not freely negotiated by the parties. Rather, says Petitioner, the district judge dictated the settlement and imposed it on class counsel who were both disabled by conflicts of interest and ignorant of the number and nature of claims extant among class members. Petitioner's contention, however, is unsupported by the Record, was rejected by both courts below and raises only issues of fact warranting no review.

The settlement negotiations here extended over two months; involved every member of court-appointed class counsel; were overseen by three settlement masters; included the participation of the district judge only at the express request of class counsel and upon the prior agreement of all parties; and resulted in a $180 million settlement of highly dubious claims. The impetus for the settlement was a recognition by class counsel on the eve of trial—after five years of extensive discovery that assured that class counsel was aware of the relative strengths and weaknesses of its case—of "the paucity of present evidence that Agent Orange injured the plaintiffs," 818 F.2d at 172 (App. 734a), and the insurmountable hurdle of the military contractor defense. *Id.* at 173 (App. 737a).

The claim that the settlement was unfair because judicially coerced first surfaced in, and rests exclusively on, the February 23, 1985 oral, sworn statement of Benton Musslewhite, JA 13548-668 (Doc. 5600), counsel of record for Petitioner and a former member of class counsel.

Approximately one month earlier, the district court had awarded Mr. Musslewhite only a fraction of the attorney's fees he had sought as a member of class counsel, and published unflattering observations of his professional perfomance. JA 11744-45. A short time later, Mr. Musslewhite resigned from class counsel and moved on the basis of his oral sworn statement, pursuant to Fed. R. Civ. P. 59 and 60, to set aside the settlement.

That motion and one other similarly predicated were denied in open court on March 18, 1985 by the district court, which by implication flatly rejected the accuracy and import of Mr. Musslewhite's statement. JA 14460-64. The attack on the district judge's conduct was then reprised in the court of appeals, which likewise rejected it by implication as devoid of merit. *See* 818 F.2d at 170 (App. 729a) (rejecting as "totally frivolous" the class objectors' argument that the district judge "was *too* involved in [the settlement's] negotiation," but at the same time lacked sufficient knowledge of it to assess its reasonableness (emphasis in original)). Petitioner's contention that Mr. Musslewhite's self-serving account was "never contradicted" (Pet. 14) and warrants this Court's review is without merit.*

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* Petitioner attempts to frame the issue as one involving a conflict between the conduct of the district court and certain well-settled principles regarding the court's role in mediating settlements. The cases cited by Petitioner, however, are inapposite. They do not address the scope of district court involvement in the negotiation process, but hold rather that in approving a settlement the district court cannot modify its terms. *See Plummer* v. *Chemical Bank*, 668 F.2d 654, 655-56 n.1 (2d Cir. 1982); *Armstrong* v. *Board of School Directors*, 616 F.2d 305, 315 (7th Cir. 1980); *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1125 n.24 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979); *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1172 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979).

Nor should a writ issue to review class counsel's fee sharing agreement and its asserted adverse effect on the fundamental fairness and adequacy of the settlement. The district court here fully explored the agreement and found, based upon its "direct observation of counsel, the litigation and settlement negotiations," that "there is no reason to believe that the existence of [class counsel's] fee sharing agreement had any appreciable untoward effect on the decision to settle." 611 F. Supp. at 1461 (Resp. App. A41). Although on appeal the court of appeals invalidated the agreement, holding that it created impermissible incentives on the part of class counsel to settle, 818 F.2d at 218, 223-24 (Resp. App. A3, A15-16), the court declined to disturb the settlement. It observed, rather, that there were "grave weaknesses in plaintiffs' case," and found, in accord with the district court, that the agreement "does not affect the instant settlement." 818 F.2d at 174 (App. 738a). Review by the Court of this factual issue is unwarranted, particularly in view of the concurrent findings of the two lower courts. *See Rogers* v. *Lodge,* 458 U.S. 613, 623 (1982).

Petitioner contends that class counsel's lack of knowledge of the number and nature of claims demonstrates the "impropriety of negotiations" and makes clear that the settlement was the product of "uneducated guesswork." (Pet. 42-43.) But both lower courts here correctly concluded that class counsel's lack of hard information as to the number of claims reflects the absence of epidemiologic data favorable to plaintiffs and is a "sign of the weakness of the plaintiffs' case," and a fact that "supports rather than undermines the settlement." 818 F.2d at 171 (App. 732a); *see* 597 F. Supp. at 787-95 (App. 231a-47a) (summarizing epidemiologic data). Certainly no writ is appropriate to review the correctness of the lower courts' extensive review of the pertinent medical and scientific evidence.

III.

The Post-Settlement Procedures Employed by the District Court Were Wholly in Accord With Settled Law.

Petitioner contends that the courts of appeal's decisions regarding post-settlement procedures in class actions are "fuzzy, inconsistent and frequently in diametrical conflict" (Pet. 47); that the district court here failed to protect the post-settlement rights of class members (Pet. 44-45); and that, accordingly, this Court should grant certiorari and adopt for mass tort class actions certain "procedural absolutes" (Pet. 47) designed to protect the post-settlement rights of individual class members (Pet. 45).

There is, however, no pertinent conflict in the circuits and Petitioner fails even to point to one. No court has required the post-settlement procedures that Petitioner asks the Court to announce in this case. Here, moreover, the post-settlement procedures employed by the district court were wholly in accord with settled law, *see* 597 F. Supp. at 758-64 (App. 170a-83a), and displayed a scrupulous concern for the rights of all class members. The court of appeals so determined. 818 F.2d at 169-70 (App. 729a). Additionally, any pronouncement by this Court concerning post-settlement procedures in mass tort class actions will have limited precedential value because such cases have been and, in all likelihood, will continue to be rare. *See, e.g., id.* at 164-67 (App. 716a-23a). In such circumstances, the writ should be denied.

A. Pre-Notification Hearing

Petitioner claims that certiorari is warranted because the district court was required to hold a pre-notification hearing to determine the number and nature of claims, develop a distribution plan, and estimate the fees and charges against

the settlement fund. (Pet. 45-46). Only upon completion of that process, asserts Petitioner, and a determination by the district court that the settlement offer is " 'within the range' of adequacy and reasonableness," should the court proceed with settlement notice and fairness hearings. (Pet. 46).

The purpose of a pre-notification process and hearing, however, is "to avoid wasting time and money when a proposed settlement does not approach fairness." 597 F. Supp. at 760 (App. 174a). There is no reason for the district court to hold a hearing when, as here, it has before it "sufficient facts intelligently to approve the settlement offer." 818 F.2d at 170 (App. 729a). *See Manual For Complex Litigation, Second* § 30.44 at 241 (1985) ("initial assessment may be made on the basis of matters already known by the court" without a hearing). The district court here had carefully reviewed and analyzed much of the relevant scientific literature, *see* 597 F. Supp. at 747, 775-95 (App. 145a-46a, 207a-47a), "had closely followed the settlement negotiations," *id.* at 760 (App. 174a), and "was thoroughly informed of the strengths and weaknesses of the parties' positions," 818 F.2d at 170 (App. 729a). It "implicitly found that the settlement was within the range of possible approval before notifying the class." 597 F. Supp. at 760 (App. 174a). In such circumstances, no hearing was necessary, and Petitioner's claim otherwise was rejected by the court of appeals as "totally frivolous." 818 F.2d at 170 (App. 729a).

B. Settlement Notice

Petitioner also contends that a writ should issue to review the validity of the settlement notice. The notice was defective, he alleges, because among other things it failed to describe the plan of distribution. But, as the lower courts here recognized, 818 F.2d at 170 (App. 729a); 597

F. Supp. at 759-60 (App. 171a-74a), the purpose of a settlement notice is to apprise class members of the terms of the settlement and of the opportunity to present to the court objections and other matters the court might not consider in its evaluation of the fairness of the settlement. *Mendoza* v. *United States,* 623 F.2d 1338, 1348-49 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981); *Pearson* v. *Ecological Science Corp.,* 522 F.2d 171, 176-77 (5th Cir. 1975), *cert. denied,* 425 U.S. 912 (1976) (quoting 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1797 at 234 (1972)).

The notice here contained both a general description of the settlement and a copy of the settlement agreement to "enhance communication with the class." 597 F. Supp. at 759 (App. 173a). As such, it complied fully with the well-settled requirements, *see id.* at 759-60 (App. 171a-74a), and the court of appeals so held, 818 F.2d at 170 (App. 729a).

Despite Petitioner's claim otherwise, there neither is, nor should be, an absolute requirement that the plan of distribution be formulated prior to notification of the class. *See* 818 F.2d at 170 (App. 729a); 597 F. Supp. at 763 (App. 182a); *In re Corrugated Container Antitrust Litigation,* 643 F.2d 195, 223-24 (5th Cir. 1981), *cert. denied,* 456 U.S. 998 (1982); *Manual For Complex Litigation, Second* § 30.212 at 226 n.58 (1985) ("[often . . . the details of allocation and distribution are not established until after the settlement is approved"). As the court of appeals observed:

> The prime function of the district court in holding a hearing on the fairness of the settlement is to determine that the amount paid is commensurate with the value of the case. This can be done before a distribution scheme has been adopted so long as the distribution scheme does not affect the obliga-

> tions of the defendants under the settlement agreement. The formulation of the plan in a case such as this is a difficult, time-consuming process. To impose [such] an absolute requirement . . . would immensely complicate settlement negotiations and might so overburden the parties and the district court as to prevent [effectuation of a settlement]. Moreover . . . reversal of any significant aspect of the [distribution] plan on appeal . . . would require a remand for reconsideration of the settlement, followed by yet another appeal. There is no sound reason to impose such procedural straitjackets upon the settlements of class actions.

818 F.2d at 170 (App. 729a-30a).

Finally, Petitioner's assertion that the settlement notice must provide class members the right to opt out of the class after they have learned of the settlement terms (Pet. 47) is meritless. No "right" to opt out of the settlement, agreed to on May 7, 1984, existed after the Rule 23(b)(3) opt out period lapsed on May 1, 1984. 597 F. Supp. at 759 (App. 172a); *see Officers For Justice* v. *Civil Serv. Comm'n,* 688 F.2d 615, 634-35 (9th Cir. 1982), *cert. denied,* 459 U.S. 1217 (1983); *In re Four Seasons Secs. Laws Litigation,* 502 F.2d 834, 842-43 (10th Cir.), *cert. denied,* 419 U.S. 1034 (1974); Fed. R. Civ. P. 23(c)(3).*

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* Petitioner's reliance (Pet. 49) on *West Virginia* v. *Chas. Pfizer & Co.,* 440 F.2d 1079, 1082-83, 1091 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971) and *Ace Heating & Plumbing Co.* v. *Crane Co.,* 453 F.2d 30, 32-33 (3d Cir. 1971), is misplaced. In each of those cases, certification followed settlement and the notice sent the class members was both a Rule 23(c)(2) and 23(e) notice. *Pettway* v. *American Cast Iron Pipe Co.,* 576 F.2d 1157, 1182 (5th Cir. 1978), *cert. denied,* 439 U.S. 1115 (1979), a Title VII employment discrimination action, is similarly inapposite. That case involved a district court decree ordering injunctive relief and back pay to a newly created subclass, and provided members of the subclass with the right to opt out of the back pay award. The defendant unsuccessfully claimed that the decree, which was sent to some members of the class, constituted Rule 23(e) notice.

This rule "precludes 'sideline sitting' until after an adjudication and then 'one-way intervention' by the class member if the adjudication is favorable to the class"—a prior discredited practice precluded by the 1966 amendments to the Federal Rules of Civil Procedure. 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 23.55 at 23-429 (2d ed. 1987); 7B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1787 at 211 (2d ed. 1986).

Conclusion

For each of the reasons stated the petition for a writ of certiorari should be denied.

Dated: New York, New York
November 30, 1987

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1118—August Term, 1985
(Argued: April 10, 1986 Decided: April 21, 1987)
Docket No. 85-6365

IN RE

"AGENT ORANGE"

PRODUCT LIABILITY LITIGATION
(APPEAL OF DAVID DEAN)

Before:

VAN GRAAFEILAND, WINTER and MINER,
Circuit Judges.

Appeal from an order and judgment of the United States District Court for the Eastern District of New York (Weinstein, Ch. J.) denying appellant's motion to set aside fee sharing agreement under which members of Plaintiffs' Management Committee would receive, from the pool of fees awarded by the district court, a threefold return on funds advanced to the class for litigation expenses.

Reversed.

LEON FRIEDMAN, Hempstead, N.Y.
for Appellant Dean.

ELIHU INSELBUCH (Gilbert, Segall and Young, New York, N.Y. Richard B. Schaeffer, New York, N.Y., of Counsel) for *Appellee Agent Orange Plaintiffs' Management Committee.*

MINER, Circuit Judge:

Our discussion of the background and procedural history of this litigation appears in Judge Winter's lead opinion, 818 F.2d 145. This portion of the *Agent Orange* appeal concerns the district court's approval of a fee sharing agreement entered into by the nine-member Plaintiffs' Management Committee ("PMC") in December of 1983. Under the agreement, each PMC member who had advanced funds to the class for general litigation expenses was to receive threefold return on his investment prior to the distribution of other fees awarded to individual PMC members by the district court. In result, the agreement dramatically increased the fees awarded to those PMC members who had advanced funds to the class for expenses, and concurrently decreased the fees awarded to non-investing PMC members, who only performed legal services for the class.

David Dean, lead trial counsel for the plaintiff class and a non-investing member of the PMC, challenges the validity of the agreement, to which he was a signatory, contending that it violates DR 5-103 and DR 2-107(A) of the ABA Code of Professional Responsibility ("ABA Code"). The ABA Code provisions prohibit an attorney from acquiring a proprietary interest in an action in which he is involved and from dividing a fee with an attorney who is not a member of his firm, unless such division is made pursuant to client consent and is based upon services performed and responsibility assumed. In addition, Dean asserts that such an agreement, which premises the size of a fee on the amount advanced for expenses rather than on services rendered, violates the standards and principles developed in this circuit for the award of attorneys' fees in equitable fund class actions and inevitably places class counsel in a position at odds with the interests of the class itself.

Although not informed of the existence of the fee sharing agreement until September of 1984, four months after the parties reached a settlement, the district court approved the agreement, holding that "there is no reason to believe that the existence of the PMC's fee-sharing agreement had any appreciable untoward effect on the decision to settle." *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1452, 1461 (E.D.N.Y. 1985) (*"Agent Orange I"*). In essence, the court determined that the substantial financial demands placed upon counsel in complex multiparty litigation require flexibility in reviewing internal fee sharing agreements so as not to discourage future representation of large plaintiff classes. At the same time, however, the district judge ruled that, in all future cases, counsel must notify the court of any fee sharing agreement *at the time of its inception*. In this way, according to the district judge, "the court at the outset can determine whether to permit the fee allocation agreement to stand before any attorney invests substantial time and funds." *Id.* at 1463.

Because we find that the agreement before us violates established principles governing awards of attorneys' fees in equitable fund class actions and creates a strong possibility of a conflict of interest between class counsel and those they were charged to represent, we reverse the district court's approval of the agreement. Accordingly, the fees originally allocated by the district court, based on the reasonable value of services actually rendered, will be distributed to the members of the PMC.

I. BACKGROUND

In September of 1983 Yannacone and Associates withdrew as attorneys for the class, claiming financial and management hardships. The district court then approved ap-

pointment of the PMC as new class counsel. The PMC was comprised of these members—attorneys Stephen Schlegel, Benton Musslewhite and Thomas Henderson. *In re "Agent Orange" Product Liability Litigation,* 571 F.Supp. 481 (E.D.N.Y. 1983). In later months the district court approved the expansion of the PMC to encompass six additional members, including appellant David Dean. Dean, a member of the original panel of class counsel, had been closely involved with the Agent Orange litigation since its inception in 1979. In October of 1983 the district court appointed him to be the attorney responsible for leading the preparation and potential trial of plaintiffs' case.

In December of 1983, as a means of raising the capital necessary for the maintenance and continuation of the lawsuit, the nine PMC members entered into a written fee sharing agreement whereby six of the members each promised to advance the class $200,000 for general litigation expenses. The agreement provided that the investing members would be reimbursed threefold from the pool of attorneys' fees awarded to PMC members upon successful completion of the action. The fees remaining in the pool after the investment pay-outs would be distributed pursuant to a fifty-thirty-twenty percent formula: fifty percent of the remainder would be distributed equally among the nine PMC members, thirty percent would be distributed according to the number of hours each member expended in the case, and twenty percent would be distributed in accordance with certain quality and risk factors relating to each PMC member's work in the action, as determined by a majority vote of the PMC. All PMC members, including Dean, signed the agreement. The district court, however, was not notified of its existence.

The action was settled in May of 1984 and the district court, by order dated June 11, 1984, notified counsel that

petitions for attorneys' fees were to be submitted to the court no later than August 31, 1984. A hearing on the issue of fees was scheduled for late September. In ordering the hearing, the district court waived application of Rule 5 of the Local Rules of the Eastern District of New York requiring notice to the class of all fee applications *and fee sharing agreements* prior to the hearing on such fee petitions. The court gave as its reasons "the need for continued intensive work by the attorneys until the close of the fairness hearings and . . . the complexity of the fee applications." Notice of Proposed Settlement of Class Action, *reprinted in In re "Agent Orange" Product Liability Litigation,* 597 F.Supp. 740, 867 (E.D.N.Y. 1984). When the court waived application of the local rule, it was unaware of the PMC fee sharing agreement.

It was not until the PMC submitted its joint fee petition that the court finally learned of the agreement. At the September hearing on the fee petitions, the district judge expressed doubts as to the agreement's propriety and requested further briefing on the issue. Faced with the reservations expressed by the district judge, the PMC members modified their agreement in December of 1984. The revised agreement, and the one now before use, provided that five of the six investing members of the PMC each would advance an additional $50,000 for general litigation expenses, bringing their total investments to $250,000 each. In return for these advances, as well as for the $200,000 advanced by the sixth investing member, the new agreement provided for the same threefold return as did the original agreement. The fifty-thirty-twenty percent formula for the distribution of the remaining portion of the fees, however, was eliminated. In its place, the revised agreement called for the remainder to be distributed *pro rata* to each PMC member "in the proportion the individual's and/or firm's

fee award bears to the total fees awarded." [1] *Agent Orange I*, 611 F.Supp. at 1454.

On January 7, 1985, the district court issued a Memorandum and Order awarding over $10 million in fees and expenses to the various counsel whose work had benefitted the class, applying the principles of fee distribution in equitable fund actions set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) (*"Grinnell I"*) and *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093 (2d Cir. 1977) (*"Grinnell II"*). *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296 (E.D.N.Y. 1985) (*"Agent Orange II"*). As later amended and supplemented, the district court's decision awarded over $4.7 million in

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[1] The agreement, in pertinent part, provided as follows:

> When and if funds are received, either by the AOPMC or individual members thereof, the first priority distribution will be to distribute to Messrs. Brown, Chesley, Henderson, Locks, O'Quinn and Scharwtz, an amount equivalent to the actual monies expended for which these six signatories were responsible toward the common advancement of the litigation up to $250,000.00 with a multiplier of three (i.e., none of these six individuals will receive more than $750,000 each), which shall be paid to them for having secured the funds for the AOPMC and to Messrs. Dean, Schlegel and Musslewhite an amount equivalent to the actual monies expended by these three signatories toward the common advancement of litigation up to $50,000.00 with a multiplier of three (i.e., none of these three signatories will receive more than $150,000.00 each). Any additional expenses will be reimbursed without a multiplier as ordered by the Court. All of the expenses plus the appropriate multiplier will be deducted from the total fees and expenses awarded by the Court to all of the AOPMC firms. The remaining fees will then be distributed pro rata to each signatory in the proportion the individual's and/or firm's fee award bears to the total fees awarded.

In re Agent Orange Product Liability Litigation, 611 F.Supp. 1452, 1454 (E.D.N.Y. 1985) (quoting Revised Fee-Sharing Agreement, Dec. 13, 1984).

fees to the nine members of the PMC on an individually apportioned basis. David Dean, due to his lengthy involvement in the class action and the exceptional quality of his work, was awarded $1,424,283.75, or over thirty percent of all fees awarded to the PMC. Each of the six investing members of the PMC was awarded a much lower percentage of the entire PMC fee award, with one investor being awarded only $41,886. The highest award to an investor was $515,163.

Once the fee sharing agreement was applied to these awards, however, the amount of fees each PMC member was to receive changed dramatically. In Dean's case, application of the agreement reduced his award to $542,310, a reduction of $881,973. In contrast, Newton Schwartz, an investing member of the PMC to whom the district court awarded $41,886, was now to receive $513,026, equivalent to an hourly rate of $1,224.81. The awards to all other investing members were similarly enhanced and, in turn, the awards to the two other non-investing members were diminished, resulting in a distortion of the district court's individual PMC member fee awards. The total of all fees awarded by the court to the members of the PMC, of course, remained unchanged.[2]

In May of 1985, Dean moved in the district court to overturn the fee sharing agreement, claiming that it violated professional ethics and did not protect the rights of the class. In a Memorandum and Order issued June 27, 1985, the court denied Dean's motion and upheld the agreement, albeit with some reluctance. The court found, as a factual

[2] The effect of the fee sharing agreement on the district court's fee awards to the individual PMC members is shown by the following chart.

(footnote continued on following page)

matter, that no conflict of interest had arisen in the litigation from the fee sharing agreement and, consequently, that the interests of the class in obtaining a fair and reasonable settlement had not been impinged. *Agent Orange I,* 611 F.Supp. at 1461. Initially, the court recognized its obligation to review the agreement in its capacity as protector of the rights of the plaintiff class. It then went on to examine the propriety of the agreement under DR 2-107(A) and DR 5-103 of the ABA Code and the practical effect on the agreement on the PMC's representation of the class.

As to the DR 2-107(A), which prohibits an attorney from splitting his fee with another attorney not of the same firm unless he has the consent of his client and the "division is made in proportion to the service performed and responsibility assumed by each," the court determined that the PMC should be viewed as an *ad hoc* law firm "formed for the purpose of prosecuting the Agent Orange multidistrict litigation," *Agent Orange I,* 611 F.Supp. at 1458. The court reasoned that the business realities of the litigation required the PMC to be able to perform those functions

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(footnote continued from preceding page)

	Amount of Fees Awarded by District Court	*Amount of Fees Awarded Under the Agreement*	*Net Effect of the Agreement*
Dean (noninvestor)	$1,424,283	$542,310	—$881,973
Schlegel (noninvestor)	$944,448	393,312	— 549,136
Musslewhite (noninvestor)	344,657	206,991	— 137,666
Schwartz (investor)	41,886	513,026	+ 471,140
O'Quinn (investor)	132,576	541,128	+ 408,552
Brown (investor)	348,331	608,162	+ 259,831
Locks (investor)	487,208	651,339	+ 164,171
Chesley (investor)	475,080	647,534	+ 172,456
Henderson (investor)	515,163	659,975	+ 144,812

Brief for Appellant at 8.

ordinarily performed by actual law firms, such as splitting fees among its members. The district court also noted that the Model Rules of Professional Conduct ("Model Rules") adopted by the ABA in 1983, although not adopted in New York, reflect "an increased recognition" of these business realities by permitting fee sharing agreements based upon services rendered *or* upon written acceptance of joint responsibility by the attorneys if the client is advised of the participation and does not object and the total fee is reasonable. Model Rule 1.5(e). Recognizing the practical problem of client consent in class actions, however, the district court concluded that its duty to protect the rights of the class ordinarily could not be performed unless the attorneys involved notified the court of the existence of such an agreement "as soon as possible," *Agent Orange I,* 611 F.Supp. at 1459.

As to DR 5-103, which prohibits an attorney from acquiring a proprietary interest in an action in which he is involved, the court found that the investing members acquired no independent interest in the action because the financial return from any initial advance for expenses was to be paid from the fees otherwise awarded to the PMC members, and thus would not affect the class fund. While the court did recognize that a conflict of interest could arise from such an agreement, it cautioned that complex class actions require a more sophisticated analysis of ethical codes than ordinary two-party cases in order not to "unnecessarily discourage counsel from undertaking the expensive and protracted complex multiparty litigation often needed to vindicate the rights of a class." *Id.* at 1460. Accordingly, the district court held that a case-by-case analysis of such fee sharing agreements to identify potential conflicts of interest should be adopted.

The court conceded that an agreement of the sort before it conceivably could create an interest on the part of the investors to settle early, regardless of the benefit to, or interest of, the class. This is because an attorney whose fee is based upon the amount of funds advanced for expenses in an action will receive the same fees "whether the case is settled today or five years from now." *Id.* The court reasoned, however, that any possible interest to settle early would have been offset by the theoretical incentive to extend such litigation created by the lodestar formula and concluded that, as a factual matter, no conflict had arisen here.

The court then set forth five additional, though nondispositive, reasons for approving the agreement. First, the returns on the investments did not affect the class fund, since they were paid from the fee awards of PMC members. Second, the court recognized that the "business" of law will at times require creative, yet ethical, methods for economical and efficient operation. Third, without the funds advanced by the PMC members, it was possible that the litigation would have collapsed and neither the attorneys nor the class would receive any payments. Fourth, the court noted that the PMC members could have earned substantial returns, though not quite threefold, on these same funds if they had undertaken more traditional investments. Fifth, if the PMC members had received the amount of fees requested in their joint petition, nearly thirty million dollars, the extent of the distortion of the fees by the investment agreement would have been insubstantial.

In sum, the district court determined that the practical needs of this form of litigation required an inventive method of fund raising in order to guarantee effective representation of class rights. At the same time, however, it labeled as "troubling" the PMC's failure to inform the court of the

existence of the agreement until months after a settlement had been reached. *Id.* at 1462. In light of class counsel's fiduciary obligations to the class and the court's role as guardian of class rights in relation to settlement review, the district court found that both the class and the court had a right to be notified of the existence of such an agreement. To this end, the court proclaimed that in all future cases, class counsel would be obligated to make the existence of a fee sharing agreement known to the court at the time of its formation.

II. DISCUSSION

Dean's appeal presents an issue of first impression: whether an undisclosed, consensual fee sharing agreement, which adjusts the distribution of court awarded fees in amounts which represent a multiple of the sums advanced by attorneys to a class for litigation expenses, satisfies the principles governing fee awards and is consistent with the interests of the class.

At the outset, we note that the fees in this case were awarded pursuant to the equitable fund doctrine, first set forth in *Trustees v. Greenough*, 105 U.S. (15 Otto) 527, 26 L.Ed. 1157 (1882), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915 (1885). The underlying rationale for the doctrine is the belief that an attorney who creates a fund for the benefit of a class should receive reasonable compensation from the fund for his efforts. *Central Railroad,* 113 U.S. at 125. Because the calculation of fees necessarily will affect the funds available to the class, this circuit has adopted a lodestar formula for fee computation. *Grinnell II,* 560 F.2d at 1099; *Grinnell I,* 495 F.2d at 471. The lodestar seeks to protect the interests of the class by tying fees to the "actual

effort made by the attorney to benefit the class." *Grinnell II*, 560 F.2d at 1099. Accordingly, fees are calculated by taking the number of hours reasonably billed and multiplying that figure by an hourly rate "normally charged for similar work by attorneys of like skill in the area." *Id.* at 1098. Once calculated, the court may, in its discretion, increase or decrease this figure by examining such factors as the quality of counsel's work, the risk of the litigation and the complexity of the issues. *Id.* Discretion to adjust the lodestar figure upward because of superior quality, however, is limited to exceptional situations and must be supported by "specific evidence" and "detailed findings" by the district court. *Pennsylvania v. Delaware Valley Citizens' Council for Clear Air*. — U.S. —, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986). Adherence to these principles is essential not only to avoid awarding windfall fees to counsel, but also to "avoid every appearance of having done so," *Grinnell I*, 495 F.2d at 469.

Of equal importance to our analysis is Fed.R.Civ.P. 23(e), which requires court approval of any settlement of a class action suit and squarely places the court in the role of protector of the rights of the class when such a settlement is reached and attorneys' fees are awarded. *Grinnell II*, 560 F.2d at 1099. In fulfilling this role, courts should look to the various codes of ethics as guidelines for judging the conduct of counsel. *Agent Orange, I*, 611 F.Supp. at 1456. In addition, where only retrospective review of counsel's conduct is available, courts should not be limited to an examination of the actual effects of such conduct on the litigation, but rather, as the ABA Code and *Grinnell I* imply, the appearance and potential effect of the conduct should be reviewed as well. *See Grinnell I*, 495 F.2d at

469; ABA Code of Professional Responsibility Canon 9 (1975).

The ultimate inquiry, therefore, in examining fee agreements and setting fee awards under the equitable fund doctrine and Fed.R.Civ.P. 23(e), is the effect an agreement could have on the rights of a class. Because we find that the agreement here conflicts substantially with the principles of reasonable compensation in common fund actions set forth in *Grinnell I* and *Grinnell II,* and that it places class counsel in a potentially conflicting position in relation to the interests of the class, we reverse.

Initially, it is beyond doubt that the agreement, by tying the fee to be received by individual PMC members to the amounts each advanced for expenses, completely distorted the lodestar approach to fee awards. In setting fees here, the district judge meticulously examined counsel's fee petitions in accordance with the *Grinnell* decisions and arrived at individual awards for each PMC member based upon the services that each had provided for the class. By providing for threefold returns of advanced expenses, however, the agreement vitiated these principles. The distortion was so substantial as to increase the fees awarded to one investor by over twelve times that which the district judge had determined to be just and reasonable, and, in a second case, to decrease the otherwise just and reasonable compensation of a non-investor by nearly two-thirds.

There is authority for a court, under certain circumstances, to award a lump sum fee to class counsel in an equitable fund action under the lodestar approach and then to permit counsel to divide this lodestar-based fee among themselves under the terms of a private fee sharing agreement. *E.g., Ruskay v. Jensen,* No. 71-3169, slip op. at 10-13 (S.D.N.Y. Sept. 18, 1981); *In re Magic Marker*

Securities Litigation, [1979 Transfer Binder] Fed.Sec.L. Rep.(CCH) ¶ 97,116, at 96,195 (E.D.Pa. Sept. 16, 1979); *Valente v. Pepsico, Inc.*, [1979 Transfer Binder] Fed.Sec.L.Rep (CCH) ¶ 96,921, at 95,863 (D.Del. June 4, 1979), *appeal dismissed*, 614 F.2d 772 (3d Cir. 1980); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 395, 400 (D.D.C.1978); *Del Noce v. Delyar Corp.*, 457 F.Supp. 1051, 1055 (S.D.N.Y.1978). We reject this authority, however, to the extent it allows counsel to divide the award among themselves in *any* manner they deem satisfactory under a private fee sharing agreement. Such a division overlooks the district court's role as protector of class interests under Fed.R.Civ.P. 23(e) and its role of assuring reasonableness in the awarding of fees in equitable fund cases. *See Kamens v. Horizon Corp.*, [1981 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 98,007, at 91,218 & n. 4 (S.D. N.Y. May 26, 1981); *Steiner v. BOC Financial Corp.*, [1980 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 97,656, at 98,490 (S.D.N.Y. Oct. 10, 1980); *cf. Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881, 884 (2d Cir. 1983) ("if the court finds good reason to do so, it may reject an agreement as to attorneys' fees just as it may reject an agreement as to the substantive claims"), *cert. denied*, 466 U.S. 944, 104 S.Ct. 1929, 80 L.Ed.2d 474 (1984). In addition, this approach overlooks the class attorneys' "duty . . . to be sure that the court, in passing on [the] fee application, has all the facts" as well as their "fiduciary duty to the . . . class not to overreach." *Lewis v. Teleprompter Corp.*, 88 F.R.D. 11, 18 (S.D.N.Y. 1980).

A careful examination of those decisions permitting internal fee sharing agreements to govern the distribution of fees reveals no case where return on investment was a factor. More important, in a number of those cases the

courts apparently assumed that the internal fee sharing agreement would be based substantially on services rendered by individual counsel. *E.g., Ruskay,* slip op. at 14 n.4 ("Since the court has satisfied itself that the proposed distribution will not result in compensation beyond services performed, it declines to overrule the agreement."); *In re Ampicillin Antitrust Litigation,* 81 F.R.D. at 400 ("Since the fee application purports to be based upon the rates and time spent by the several attorneys, it is presumed that these factors also weigh heavily in this internal agreement.").

Accordingly, while the practice of allowing class counsel to distribute a general fee award in an equitable fund case among themselves pursuant to a fee sharing agreement is unexceptional, we find that any such agreement must comport essentially with those principles of fee distribution set forth in *Grinnell I* and *Grinnell II.* This does not mean that a fee sharing agreement must replicate the individual awards made to PMC members under the district court's lodestar analysis. Even after the court makes the allocation, the attorneys may be in a better position to judge the relative input of their brethren and the value of their services to the class. *See In re Ampicillin Antitrust Litigation,* 81 F.R.D. at 400. Nor does this mean that class counsel need follow, line by line, the lodestar formula in arriving at an agreement as to fee distribution. Obviously, the needs of large class litigation may at times require class counsel, in assessing the relative value of an individual attorney's contribution, to turn to factors more subjective than a mere hourly fee analysis. It does mean that the distribution of fees must bear some relationship to the services rendered.

In our view, fees that include a return on investment present the clear potential for a conflict of interest between

class counsel and those whom they have undertaken to represent. "[W]henever an attorney is confronted with a potential for choosing between actions which may benefit himself financially and an action which may benefit the class which he represents there is a reasonable possibility that some specifically identifiable impropriety will occur." *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102, 104 (5th Cir. 1978). The concern is not necessarily in isolating instances of major abuse, but rather is "for those situations, short of actual abuse, in which the client's interests are somewhat encroached upon by the attorney's interests." *Court Awarded Attorney Fees,* Report of the Third Circuit Task Force, 108 F.R.D. 237, 266 (Oct. 8, 1985). Such conflicts are not only difficult to discern from the terms of a particular settlement, but "even the parties may not be aware that [they exist] at the time of their [settlement] discussions," *id.* This risk is magnified in the class action context, where full disclosure and consent are many times difficult and frequently impractical to obtain. *In re Mid-Atlantic Toyota Antitrust Litigation,* 93 F.R.D. 485, 490-91 (D.Md.1982); *Gould v. Lumonics Research Ltd.*, 495 F.Supp 294, 297 n.6 (N.D.Ill. 1980).

The district court recognized that the agreement provided an incentive for the PMC to accept an early settlement offer not in the best interests of the class, because "[a]n attorney who is promised a multiple of funds advanced will receive the same return whether the case is settled today or five years from now." *Agent Orange I,* 611 F.Supp. at 1460. Given the size and complexity of the litigation, it seems apparent that the potential for abuse was real and should have been discouraged. Unlike the district court, however, we conclude that the risk of such an adverse effect on the settlement process provides adequate

grounds for invalidating the agreement as being inconsistent with the interests of the class. The conflict obviously lies in the incentive provided to an investor-attorney to settle early and thereby avoid work for which full payment may not be authorized by the district court. Moreover, as soon as an offer of settlement to cover the promised return on investment is made, the investor-attorney will be disinclined to undertake the risks associated with continuing the litigation. The conflict was especially egregious here, since six of the nine PMC members were investing parties to the agreement.

The district court's factual finding, that the adequacy of the settlement demonstrated that the agreement had no effect on the PMC's conduct, is not dispositive. The district court's retrospective appraisal of the adequacy of the settlement cannot be the standard for review. The test to be applied is whether, at the time a fee sharing agreement is reached, class counsel are placed in a position that might endanger the fair representation of their clients and whether they will be compensated on some basis other than for legal services performed. Review based on a fairness of settlement test would not ensure the protection of the class against potential conflicts of interest, and, more important, would simply reward counsel for failing to inform the court of the existence of such an agreement until after a settlement.

We also reject the district court's finding that its authority to approve settlement offers under Fed.R.Civ.P. 23(e) acts to limit the threat to the class from a potential conflict of interest. At this late stage of the litigation, both class counsel and defendants seek approval of the settlement. The court's attention properly is directed toward the overall reasonableness of the offer and not necessarily to whether class counsel have placed themselves in a potentially con-

flicting position with the class. It would be difficult indeed for a court at this stage to hold that, regardless of the terms of the settlement, class counsel had not fulfilled its obligation to the class. Given this focus and other administrative concerns that may come to bear, we find the approval authority, in this context, to be insufficient to assure that the ongoing interests of the class are protected. *See Alleghany Corp. v. Kirby,* 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting) (at this stage of litigation, "[a]ll the dynamics conduce to judicial approval of such settlements"), *cert. dismissed,* 384 U.S. 28, 86 S.Ct. 1250, 16 L.Ed.2d 335 (1966); *In re Mid-Atlantic Toyota Antitrust Litigation,* 93 F.R.D. at 491 (court authority to review settlement offers not adequate to safeguard against dangers of conflict of interest); Coffee, *The Unfaithful Champion: The Plaintiff As Monitor In Shareholder Litigation,* 48 Law & Contemp. Probs. 5, 26-27 (Summer 1985) (judicial review not a significant barrier to collusive settlements).

Equally unpersuasive is the district court's determination that the potential incentive to settle early is offset by an incentive, fostered by the lodestar formula, to prolong the litigation. While a number of commentators have asserted that use of the lodestar formula encourages counsel to prolong litigation for the purpose of billing more hours, *e.g.,* Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limit of Proportional Discipline,* 47 Law & Contemp. Probs. 293, 302 (Winter 1984), the formula's effect in this regard is far from clear, *see* Coffee, *supra,* at 34-35 ("the claim that the lodestar formula results in excessive fees is nonetheless a red herring"); Mowrey, *Attorneys Fees In Securities Class Action and Derivative Suits,* 3 J.Corp. Law. 267, 343-48 (1978) (attorneys' fees awards by district courts have not risen since adoption of lodestar analy-

sis); *see also* 7B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1803, at 508 (1986) (no empirical data show any incidence of district courts awarding excessive fees). Moreover, the court's authority in reviewing fee petitions and approving or disapproving hours billed in an equitable fund action works as a substantial and direct check on counsel's alleged incentive to procrastinate. *In re Equity Funding Corporation of America Securities Litigation,* 438 F.Supp. 1303, 1328 (C.D.Cal. 1977); 7B C. Wright, A. Miller & M. Kane, *supra,* § 1803, at 511. Consequently, we do not view the lodestar system as countervailing the clear interest in early settlement created by the private agreement.

Additionally, potential conflicts of interest in class contexts are not examined solely for the actual abuse they may cause, but also for potential public misunderstandings they may cultivate in regard to the interests of class counsel. *Susman v. Lincoln American Corp.,* 561 F.2d 86, 95 (7th Cir. 1977); *Prandini v. National Tea Co.,* 557 F.2d 1015, 1017 (3d Cir. 1977). While today we hold that the settlement reached here falls within that range of reasonableness permissible under Fed.R.Civ.P. 23(e), we are not insensitive to the perception of many class members and the public in general that it does not adequately compensate the individual veterans and their families for whatever harm Agent Orange may have caused. To be sure, the settlement does not provide the individual veteran or his family substantial compensation. Given the facts of this settlement, the potentially negative public perception of an agreement that awards an investing PMC member over twelve times the amount the district court has determined to be the value of his services to the class provides additional justification for invalidating the agreement and applying the lodestar formula.

We find the various additional rationales for approving the fee sharing agreement set out in the district court's decision equally unpersuasive. First, the fact that the returns on the advanced expenses did not directly affect the class fund is of little consequence, since we have already determined that the district court's responsibility under *Grinnell I* and *Grinnell II*, as well as under Fed.R.Civ.P. 23(e), goes beyond concern for only the overall amount of fees awarded and requires attention to the fees allocated to individual class counsel. Second, while we sympathize with counsel regarding the business decisions they must make in operating an efficient and manageable practice and agree that a certain flexibility on the court's part is essential, we are not inclined to extend this flexibility to encompass situations in which the bases for awarding fees in an equitable fund action are so clearly distorted. Third, whether this class action would have collapsed without an agreement calling for a threefold return is a matter of speculation. Any such collapse, however, would have been due to the pervasive weaknesses in the plaintiffs' case. Fourth, we find wholly unconvincing the district court's suggestion that the investors could have made a sizeable return on their funds if they had invested them in other ventures. We take notice of the fact that a threefold return on one's money is a rather generous return in any market over a short period of time. Fifth, while the effect of this fee sharing agreement might have been dwarfed to the point of insignificance if the fees awarded to counsel had been much greater, this simply is too speculative to defend the agreement as not affecting the interests of the class. Finally, we do not find class counsel to have formed an *ad hoc* partnership. They merely are a group of individual lawyers and law firms associated in the prosecution of a single law-

suit, and they lack the ongoing relationship that is the essential element of attorneys practicing as partners.

We do agree with the district court's ruling that in all future class actions counsel must inform the court of the existence of a fee sharing agreement at the time it is formulated. This holding may well diminish many of the dangers posed to the rights of the class. Only by reviewing the agreement prospectively will the district courts be able to prevent potential conflicts from arising, either by disapproving improper agreements or by reshaping them with the assistance of counsel to conform more closely with the principles of *Grinnell I* and *Grinnell II.* In the present case, however, where the district court was not made aware of the agreement, and the potential for a conflict of interest arising was substantial, the adoption of a rule for future cases in no way alleviates the fatal flaws of this agreement and does not offset the need for its invalidation.

Although appellant Dean is successful on this appeal, his conduct has been far from praiseworthy. He freely consented to the formation of the agreement in December of 1983 and later to its revision in 1984. He did not even inform the district court of the existence of the agreement or of his objections to it until long after the settlement was reached. If he had called the agreement into question immediately, a great deal of time and expense could have been saved.

III. CONCLUSION

Having determined that the fee sharing agreement violates the principles for awarding fees in an equitable fund action and places class counsel in a position potentially in conflict with the interests of the class which they represent, we reverse. We award all the PMC members the fees to which the district court determined they were entitled.

Opinion of the District Court (Weinstein, J.)
Dated June 27, 1985

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

MDL No. 381

IN RE

"AGENT ORANGE"

Product Liability Litigation

MICHAEL F. RYAN, et al.,

Plaintiffs,

v.

DOW CHEMICAL COMPANY, et al.,

Defendants.

STEPHEN J. SCHLEGEL, et al.,

Petitioners,

v.

DAVID J. DEAN,

Respondent.

Elihu Inselbuch and Richard B. Schaeffer, Gilbert, Segall and Young, New York City, for respondent-petitioner Majority of the Agent Orange Plaintiffs' Management Committee, consisting of Stephen J. Schlegel, Schlegel & Trafelet, Ltd., Chicago, Ill., Thomas Henderson, Henderson & Goldberg, Pittsburgh, Pa., Phillip E. Brown, Hoberg, Finger,

Brown, Cox & Molligan, San Francisco, Cal., Stanley Chesley, Waite, Schneider, Bayless & Chesley, Cincinnati, Ohio, John Q. O'Quinn, O'Quinn & Hagans, Houston, Tex., Neil R. Peterson and Gene Locks, Greitzer & Locks, Philadelphia, Pa., Newton B. Schwartz, Houston, Tex., former member Benton Musslewhite, Law Offices of Benton Musslewhite, Inc., Houston, Tex.

Leon Friedman, Hempstead, N.Y., for movant-respondent David J. Dean, Dean, Falanga and Rose, Carle Place, New York.

MEMORANDUM and ORDER

WEINSTEIN, Chief Judge:

David J. Dean, Esq., a member of the Agent Orange Plaintiffs' Management Committee ("PMC"), has moved to set aside the PMC's agreement to pay certain committee members a 300 percent return of funds they advanced to finance the litigation. The payment would be made out of all the fees awarded to the PMC attorneys by the court. The other PMC members oppose the motion and seek to compel arbitration. For reasons indicated below, Mr. Dean's motion is denied and the petition to compel arbitration is dismissed.

The issues raised by Mr. Dean's motion present new and difficult questions in the financing of major toxic tort litigations. Implicated are the boundaries of legal ethics and the legality of fee arrangements among attorneys in class actions. The instant attorneys' agreement for fee distribution will not be set aside. In any future case in this district such an agreement must be revealed to the court and members of the class as soon as possible. A "sunshine"

rule is essential to protect the interests of the public, the class and the honor of the legal profession.

I. FACTS

In 1979 cases began to be transferred to this district for consolidation of pretrial proceedings in the Agent Orange multidistrict litigation. In 1980 the court tentatively certified a class and appointed Yannacone and Associates, a consortium of local lawyers, as class attorneys. Yannacone and Associates withdrew as class counsel in September 1983 because of management problems and lack of financing. They were replaced by Stephen J. Schlegel, Benton Musslewhite, and Thomas W. Henderson. Mr. Schlegel and Mr. Henderson are members of the current PMC. Mr. Musslewhite resigned in February 1985 but still considers himself bound by the PMC fee sharing agreement.

David Dean, a member of the original management committee, remained associated with the new committee. At pretrial conferences after October 1983 the court indicated that he would be expected to take the lead in preparing and trying the case. In February 1984 the court at the PMC's request approved an expansion of its membership to include Mr. Dean and other lawyers who previously had been working informally with class counsel.

The class action was settled in May 1984 on the eve of trial. Attorney fee applications were required to be submitted by the end of August 1984. The PMC submitted a joint fee award application. Only then was the court apprised of the existence of an internal management agreement among the PMC lawyers that set out the procedure for allocation of any fees awarded from a class recovery. Its provisions called for (1) a 300% return of funds ad-

vanced by certain PMC members before any other distribution, and (2) division of the remainder of the award as follows: 50% in equal shares among all committee members, 30% in proportion to hours worked, and 20% based on factors paralleling those considered by courts in granting fee award multipliers.

After the court voiced serious doubt about the legality and propriety of this arrangement at the September 26, 1984 attorney fee hearing, the PMC members renegotiated their fee-sharing agreement. The new arrangement still requires a three-fold reimbursement of monies advanced, but the remainder of the fee awards would be allocated to those who were awarded them by the court. This renegotiated agreement, entered into on December 13, 1984, is retroactive to October 1, 1983. It provides in pertinent part as follows:

> When and if funds are received, either by the AOPMC or individual members thereof, the first priority distribution will be to distribute to Messrs. Brown, Chesley, Henderson, Locks, O'Quinn and Schwartz, an amount equivalent to the actual monies expended for which these six signatories were responsible toward the common advancement of the litigation up to $250,000.00 with a multiplier of three (*i.e.,* none of these six individuals will receive more than $750,000.00 each), which shall be paid to them for having secured the funds for the AOPMC and to Messrs. Dean, Schlegel and Musslewhite an amount equivalent to the actual monies expended by these three signatories toward the common advancement of the litigation up to $50,000.00 with a multiplier of three (*i.e.,* none of these three sig-

> natories will receive more than $150,000.00 each). Any additional expenses will be reimbursed without a multiplier as ordered by the Court.
>
> All of the expenses plus the appropriate multiplier will be deducted from the total fees and expenses awarded by the Court to all of the AOPMC firms. The remaining fees will then be distributed *pro rata* to each signatory in the proportion the individual's and/or firm's fee award bears to the total fees awarded.

The agreement also provides for mandatory arbitration of "[a]ny dispute concerning monies due a member [of the PMC] or his rights under this agreement."

Messrs. Brown, Chesley, Locks, O'Quinn and Schwartz each have advanced $250,000. Mr. Henderson has contributed a total of $200,000. The remaining three PMC members have not advanced any funds for general expenses, although they have incurred individual expenses, for which they will be individually reimbursed. *See In re "Agent Orange" Product Liability Litigation,* 611 F.Supp. 1296 (E.D.N.Y. Jan. 7, 1985, as modified June 18, 1985).

According to Mr. Dean, the agreement will be interpreted to reach the results indicated in the following table taken from his motion papers. The figures given are based on the fees awarded in the January 7, 1985 order rather than the somewhat higher awards ultimately allowed on reconsideration. *See In re "Agent Orange" Product Liability Litigation,* 611 F.Supp. 1296 (E.D.N.Y. January 7, 1985, as modified June 18, 1985). Nevertheless, the general fee-shifting effect shown by the table remains essentially the same. Those who

advanced money would be advantaged over those who gave time and skill to the enterprise.

	Court Awarded Fees	*Net Fees Under Agreement*	*Gain Or Loss*	*Court Awarded Rate*	*Net Hourly Rate*
BROWN	296,493.75	551,157.19	+254,663.44	225.00	418.26
CHESLEY	390,993.75	567,476.19	+176,482.44	225.00	326.56
HENDERSON	442,552.50	576,358.26	+133,805.76	225.00	293.03
LOCKS	332,268.75	562,354.76	+230,086.01	225.00	380.81
O'QUINN	88,305.00	515,217.00	+426,912.00	100.00	583.45
SCHWARTZ	29,145.00	505,026.34	+475,881.34	100.00	1,732.81
DEAN	1,340,437.50	331,346.75	—1,009,090.75	225.00	55.62
MUSSLEWHITE	304,657.50	152,535.04	—152,122.46	100.00	75.10
SCHLEGEL	763,678.12	231,785.14	—531,892.99	262.50	79.67

II. PROCEDURAL POSTURE

By notice of motion dated May 20, 1985, Mr. Dean has asked the court to set aside the PMC's fee-sharing agreement. The jurisdictional predicate for the motion is not stated. A new motion to alter or amend the January 7, 1985 judgment insofar as it concerns the agreement would no longer be timely under Rule 59(e) of the Federal Rules of Civil Procedure. A number of Rule 59(e) motions requesting reconsideration of the January 7, 1985 fee order, including one by Mr. Dean to increase his fee award, were pending when his motion was filed. His present application will be deemed a timely amendment to his original Rule 59(e) motion. Alternatively, Mr. Dean's motion will be treated as an independent action for declaratory judgment. *See* 28 U.S.C. § 2201; Fed.R.Civ.P. 57. Federal question jurisdiction would exist. *See infra* Part III. Diversity of citizenship, though unneeded, is present as well.

The other PMC members have opposed Mr. Dean's motion and seek arbitration of the issues raised. They have submitted an independent petition to compel arbitration or, in the alternative, a motion for a stay of proceedings pending arbitration, pursuant to the Federal Arbitration

Act. *See* 9 U.S.C. §§ 3, 4. Both applications will be decided in this memorandum and order, which will supersede the unpublished January 7, 1985 memorandum of this court insofar as the latter referred to the PMC's fee-sharing agreement.

III. LAW ON REVIEW OF FEE-SHARING AGREEMENTS

Under Rule 23(e) of the Federal Rules of Civil Procedure, the court has an obligation to protect the rights of class members. That duty requires review of the reasonableness of an internal fee-sharing agreement to ensure that it does not pose a danger of harm to the class. The court also has supervisory authority over attorneys who practice before it and thus an obligation to prevent breaches of professional ethics. *See, e.g., In re Corn Derivatives Antitrust Litigation,* 748 F.2d 157, 160, 166 (3d Cir. 1984) (federal court has inherent power to discipline attorneys practicing before it); *Dunn* v. *H.K. Porter Co., Inc.,* 602 F.2d 1105, 1114 (3d Cir. 1979) (court has authority to review and set aside contingent fee contracts under Rule 23(e) and its supervisory power); *Prandini* v. *National Tea Co.,* 557 F.2d 1015, 1019 (3d Cir. 1977) (applying bar association disciplinary rules to fee allocation agreement); *City of Detroit* v. *Grinnell Corp.,* 560 F.2d 1093, 1099 (2d Cir. 1977) (nothing court's obligation to class members when determining the amount of fee award); Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1607 (1976).

Rule 23(e) and the common fund doctrine require a court to fix reasonable attorney fees when a settlement fund has been created in a class action. Under the "lodestar" formula prevailing in this and other circuits, the "touchstone for the fee [is] to be the actual effort made

by the attorney to benefit the class." *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1099 (2d Cir. 1977). *See, e.g., In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296 (E.D.N.Y. Jan. 7, 1985, as modified June 18, 1985) (containing an extensive discussion). When an attorney has performed services for the class but is allocated a portion of the fee award by an agreement among attorneys in an amount far different from the value of the services rendered to the class, the court must review the allocation to protect the rights of the class. Whether the total fee award amount is affected by the allocation is not decisive. *See, e.g., Lewis v. Teleprompter Corp.*, 88 F.R.D. 11, 16-24 (S.D.N.Y. 1980); *cf. Housler v. First National Bank*, 524 F.Supp. 1063, 1065-66 (E.D.N.Y. 1981) (ignoring fee sharing arrangement not brought to court's attention at outset of agreement).

In a number of instances, courts have permitted class counsel to decide how a court-awarded fee should be allocated among them. *See In re Magic Marker Securities Litigation*, [1979-1980] Fed.Sec.L.Rep. (CCH) ¶ 97,116 at 96,195 (E.D.Pa. 1979) (approving joint fee application); *Valente v. Pepsico, Inc.*, [1979] Fed.Sec.L.Rep. (CCH) ¶ 96,921 at 95,863 (D.Del. 1979); *Del Noce v. Delyar Corp.*, 457 F.Supp. 1051, 1055 (S.D.N.Y. 1978) ("private arrangement as if they were law partners, or joint venturers"); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 395, 400 (D.D.C. 1978) ("Court will defer to the attorney's request that the fee award be made to the Committee of Counsel as a whole, and will not inquire further into the agreement among the attorneys"). None of these cases, however, holds that a court has no power to review an internal fee allocation agreement or that it has no duty to do so when circumstances call for such an inquiry. An attitude of "judicial indifference to attorney fee sharing arrangements,"

whatever its propriety under ordinary circumstances, is "inappropriate here where another interest of general concern is implicated." *Kamens v. Horizon Corp.* [1981] Fed.Sec.L.Rep. (CCH) ¶ 98,007 at 91,218 n. 4 (S.D.N.Y. 1981).

Federal law governs the exercise of Rule 23(e) responsibilities and the court's inherent supervisory authority. *See Dunn v. H.K. Porter Co., Inc.*, 602 F.2d 1105, 1110 n. 8 (3d Cir. 1979). Principles of professional ethics provide useful guidance to the courts in administering Rule 23(e) and in exercising their supervisory power since federal law has not developed comprehensive standards to govern the conduct of attorneys. In light of the value of uniformity in regulating the bar, federal courts look to the ABA Code of Professional Responsibility and the recently promulgated ABA Model Rules of Professional Conduct. *See in re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 160-61 (3d Cir. 1984); Code DR 2-107, 5-103; Model Rule 1.5, 1.8.

The Code has been enacted in nearly every state. The Model Rules, approved by the ABA in 1983, have been adopted by Arizona, New Jersey, and the United States Claims Court and Tax Court. They are under consideration in a number of other states including New York. *See* ABA/BNA Lawyers' Manual on Professional Conduct 613-14, 792 (current supp.).

Under Rule 23(e) these ethical principles are not dispositive. The focus of Rule 23(e) is prevention of harm to the rights of the class, a consideration that is independent of, albeit usually consistent with, the Code and Model Rule standards. In addition, general professional ethics guidelines may require interpretation in the class action setting because of the special problems posed by this kind of litigation. As Judge Adams recently observed:

> Perhaps no area of the law provokes as much litigation concerning ethical issues as class actions. . . . Moreover, the Code of Professional Responsibility, Model Rules of Professional Conduct, as well as bar association opinions provide title guidance to the class action practitioner. . . . Courts confronting an ethical problem in the class action setting must focus on two points. First, courts cannot mechanically transpose to class actions the rules developed in the traditional lawyer-client setting context; and second, a resolution of such issues would appear to call for a balancing process that in most cases should be undertaken initially by the district court.

In re Corn Derivatives Antitrust Litigation, 748 F.2d 157, 163 (3d Cir. 1984) (Adams, J., concurring) (citations omitted). Thus a careful analysis must be undertaken with particular attention to the problems and policies of class litigation.

IV. PETITION TO COMPEL ARBITRATION

The petition for an order compelling arbitration is largely mooted, given the decision on the merits of Mr. Dean's application. Nevertheless, the question of whether this dispute must be referred to arbitration is an antecedent issue that must be addressed before the merits are reached.

The parties disagree about whether the scope of the fee-sharing agreement's arbitration clause is broad enough to cover the issues raised. The provision by its terms requires arbitration of disputes "concerning monies due a member or his rights under this agreement." The scope of this "clause, like any contract provision, is a question of intent

of the parties." *S.A. Mineracao da Trindade-Samitri v. Utah International, Inc.*, 745 F.2d 190, 193 (2d Cir. 1984). "The federal policy favoring arbitration requires [a court] to construe arbitration clauses as broadly as possible." *Id.* at 194. Doubts about arbitrability "should be 'resolved in favor of coverage.'" *Wire Service Guild v. United Press International,* 623 F.2d 257, 260 (2d Cir. 1980) (quoting *International Association of Machinists and Aerospace Workers, AFL-CIO v. General Electric Co.*, 406 F.2d 1046, 1048 (2d Cir. 1969)).

Intent of the parties here is unclear. The questions before the court concern amounts payable to PMC members or their contractual rights only in the strained sense that resolution of these issues will determine whether the PMC can allocate fees in accordance with the agreement. Arguably the arbitration provision does not cover such issues. A decision on the scope of the arbitration clause is not required because the issues presented by Mr. Dean's motion are not arbitrable, whether or not the clause purports to cover them.

The general federal policy favoring arbitration must be balanced against the equally significant policies favoring judicial determination of questions about the propriety of professional conduct under Rule 23(e) and the court's supervisory obligations. "In such a situation, generalities must give way to careful analysis of the different, sometimes competing, public policy interests." *Allegaert v. Perot,* 548 F.2d 432, 438 (2d Cir.) (certain bankruptcy issues not arbitrable), *cert. denied,* 432 U.S. 910, 97 S.Ct. 2959, 53 L.Ed.2d 1084 (1977). *See also, e.g., Wilko v. Swan,* 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953) (claims under Securities Act of 1933 not arbitrable) (cited with approval in *Dean Witter Reynolds, Inc. v. Byrd,* — U.S. —, 105 S.Ct. 1238, 1240 n. 1, 84 L.Ed.2d 158 (1985));

Smokey Greenhaw Cotton Co., Inc. v. Merrill Lynch Pierce Fenner & Smith, Inc. 720 F.2d 1446, 1448 (5th Cir. 1983) (claims under Securities Exchange Act of 1934 not arbitrable); *N.V. Maatschappij Voor Industriele Waarden v. A.O. Smith Corp.*, 532 F.2d 874, 876 (2d Cir. 1976) (antitrust and patent invalidity issues not arbitrable); *American Safety Equipment Corp. v. J.P. Maguire & Co., Inc.*, 391 F.2d 821, 825-28 (2d Cir. 1968) (antitrust issues not arbitrable); *S.A. Mineracao da Trindade-Samitri v. Utah International Inc.*, 576 F.Supp. 566, 574-75 (S.D.N.Y.) (RICO claims not arbitrable), *order certified for interlocutory appeal*, 579 F.Supp. 1049 (S.D.N.Y.), *appealed on other grounds and affirmed*, 745 F.2d 190, 196-97 (2d Cir. 1984).

The legality of the fee allocation agreement under Rule 23(e) and the supervisory power of the court in ethical matters involving the bar is not an issue that the court can abandon to arbitrators. The "public interest in the dispute" is too great. *Allegaert*, 548 F.2d at 436. To allow an arbitrator to decide the questions here involved—questions that can be raised by the court *sua sponte* or by any class member—would be an abdication of responsibilities to the class and public that the law requires the court to discharge. Lawyers cannot limit the court's legal powers and duties by agreement among themselves. The issues of the legality and propriety of the fee-sharing arrangement "raised here are inappropriate for arbitration." *American Safety Equipment Corp.*, 391 F.2d at 828.

V. VALIDITY OF THE PMC FEE-SHARING AGREEMENT

Under the terms of the renegotiated agreement now before the court, each PMC member who advanced money for general expenses of the group as distinguished from individual

expenses would receive three times the amount advanced, the multiplied amount being paid out of the individual fee and expense allowances of the individual members and the expense allowance of the PMC. The question to be decided is whether this fee allocation must be stricken either as a violation of professional ethics or as a threat to the rights of the class.

The PMC fee-sharing agreement raises two potential problems of professional ethics: inappropriate division of fees between lawyers who are not members of the same firm, and acquisition of a financial interest in the litigation. Ethical prohibitions in either respect are inapplcable here. In addition, no danger to the rights of the class is present under the circumstances of this case. Other considerations render undesirable a mechanical rule against fee-sharing agreements of this kind in all cases.

A. *Division of Fees*

The ABA Code of Professional Responsibility prohibits a lawyer from dividing a legal fee with another lawyer who is not in the same law firm, unless (1) the client consents to the arrangement, (2) the "division is made in proportion to the services performed and responsibility assumed by each," and (3) the total fee is reasonable. Code DR 2-107(A). The Model Rules of Professional Conduct adopted by the ABA in 1983 contain a more liberal provision. It allows lawyers not in the same firm to divide a fee if (1) either "the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation," (2) the client does not object to any lawyer's participation, and (3) the total fee is reasonable. Model Rule 1.5(e).

Neither provision necessarily restricts the freedom of the PMC to allocate fees among committee members. The PMC may be considered an *ad hoc* law firm, a joint venture formed for the purpose of prosecuting the Agent Orange multidistrict litigation.

Business realities of law practice often require that those who bring clients and capital to a law firm be better compensated than those whose talents lie in the area of preparing legal papers and arguments. *See generally* M. Altman & R. Weil, How to Manage Your Law Office ch. 5 (1984); Law Office Economics and Management Manual §§ 2, 15, 27 (1984). Rainmakers are usually better rewarded than those who labor in the back room. Given the state of the case when Yannacone and Associates found itself without funds to continue, it was clear when the PMC was organized that money was a more sought after commodity than talent.

Viewed from this perspective, the Code and Model Rule restrictions on splitting fees among lawyers of different firms do not control this joint venture. *Cf.* D.C.Bar Comm. on Legal Ethics Op. 151 (April 16, 1985) (DR 2-107(A) permits lawyer who is of counsel to a firm to split fee between lawyer and firm if the of-counsel relationship is akin to that of lawyers in a law firm), *summarized in* ABA/BNA Lawyers' Manual on Professional Conduct 766 (current supp.); N.Y. City Bar Ass'n Comm. on Professional and Judicial Ethics Op. 82-66 (March 29, 1985) (DR 2-107 (A) permits attorney admitted in another state who is in firm to share fees with the firm, whether or not attorney works in New York or out-of-state office), *summarized in* ABA/BNA Lawyers' Manual on Professional Conduct 745-46 (current supp.); *In re Corn Derivatives Antitrust Litigation,* 748 F.2d 157, 163 (3d Cir. 1984) (Adams, J., concurring) (general principles of professional ethics cannot be applied blindly in class action setting).

The Model Rule provision clearly reflects an increased recognition of the business realities of the legal profession. As the commentary notes, "[a] division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. . . ." Model Rule 1.5(e) comment.

The PMC agreement meets the Rule's requirements. First, each PMC member assumed joint responsibility for prosecution of the class action, and that assumption of responsibility was approved by the court on behalf of the class. *Cf.* ABA Comm. on Ethics and Professional Responsibility Informal Op. 85-1514 (April 27, 1985) (Model Rule 1.5(e) requires assumption of responsibility comparable to that of a partner in a law firm under similar circumstances, including financial and ethical responsibility and responsibility for adequacy of representation and client communication), *summarized in* ABA/BNA Lawyers' Manual on Professional Conduct 766-67 (current supp). Second, the total fee allowed by the court is reasonable by definition.

No ethical violation can be found here on the basis of inappropriate division of fees among lawyers not in the same firm. Nevertheless, the provisions of Model Rule 1.5(e) and Code DR 2-107(A) on disapproval by the client of any fee splitting arrangement suggest that the class—and the court as the protector of the class—has a continuing interest in being informed of any special fee arrangement as soon as possible.

B. *Acquisition of Interest in Litigation*

The ABA Code of Professional Responsibility prohibits a lawyer from acquiring a proprietary interest in a case except by a lien for fees or a contingent fee agreement.

Code DR 5-103(A). An attorney may advance or guarantee the expenses of a litigation only if the client remains ultimately liable for payment. *Id.* 5-103(B). This latter provision has been held applicable to class actions, notwithstanding that it presents a formidable obstacle to the practical ability of counsel to prosecute class litigation. *See, e.g., In re Mid-Atlantic Toyota Antitrust Litigation,* 93 F.R.D. 485 (D.Md. 1982) (denying class certification because arrangement between named plaintiffs and counsel violated DR 5-103(B)); Birmingham Bar Ass'n Op. 22 (May 13, 1983) (DR 5-103(B) prohibits contingent expense agreement in class actions), *summarized in* ABA/BNA Lawyers' Manual on Professional Conduct 801:1104 (1984); Va. Bar Ass'n Informal Op. 485 (Sept. 8, 1983) (same), *summarized in* ABA/BNA Lawyers' Manual on Professional Conduct 801:8813 (1984). *But cf. In re Corn Derivatives Antitrust Litigation,* 748 F.2d 157, 163 (3d Cir. 1984) (Adams, J., concurring) (general principles of professional ethics cannot be applied blindly in class action setting); Code Canon 2 ("A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available").

The Model Rules of Professional Conduct carry forward the prohibition on acquisition of a financial interest in a case. *See* Model Rule 1.8. The Rule, however, does allow a lawyer to "advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter." *Id.* 1.8(e)(1).

The PMC agreement goes beyond the simple contingent reimbursement of expenses. It contemplates the return of a profit on the funds advanced. But the profit on the investment is to be paid out of the pooled fee award, not the settlement fund. No independent interest is acquired

in the litigation by the investors. Nevertheless, to the extent that the PMC agreement creates a possible conflict of interest, it might be characterized as involving an acquisition of proprietary interest that falls within the prohibitions of the Code and Model Rules. *Cf.* Code Canon 9 ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety") (omitted from Model Rules).

The circumstances of this complex and unique class action require a more sophisticated analysis than would be appropriate in the kind of simple two-party case that furnishes the model for much of the relevant ethical guides. *See In re Corn Derivatives Antitrust Litigation,* 748 F.2d 157, 163 (3d Cir. 1984) (Adams, J., concurring). The prohibition on acquisition of a proprietary interest in a litigation has its basis in common law concepts of champerty and maintenance. It is a prophylactic rule intended to prevent conflicts of interest between lawyer and client that could interfere with the lawyer's exercise of free judgment on behalf of the client. Code EC 5-3; Model Rule 1.8 comment. Similarly, the fundamental concern in the instant case is protection of the rights of the class, in part through minimization of potentially detrimental conflicts of interest. But it is also important to avoid creation of disincentives that in individual instances may unnecessarily discourage counsel from undertaking the expensive and protracted complex multiparty litigation often needed to vindicate the rights of a class. An ironclad requirement that class representatives remain ultimately liable for expenses incurred, for example, would prevent many meritorious cases from reaching the courts.

As more fully discussed below, a simple prohibition on advances of cash for expenses does not adequately balance these competing considerations. Moreover, because of the

court's responsibility for approval of a class action settlement, it is not the only feasible alternative. A case-by-case examination is not only practical, but advances the important policies favoring class litigation in many instances.

C. *Protection of the Rights of the Class*

Under Rule 23(e) and the common fund doctrine, when a monetary settlement is reached in a class action federal courts are responsible for assessing attorney fees that are reasonable. Fee awards must reflect the actual work that benefited the class. The court's responsibility for controlling attorney fees arises from the need to safeguard the interests of the class. *See, e.g., In re "Agent Orange" Product Liability Litigation,* 611 F.Supp. 1296, 1304-1305 (E.D.N.Y. Jan. 7, 1985, as modified June 18, 1985).

When lawyers in a class action agree on an allocation of their fees *inter se* that diverges from the allocation determined by the court, the court must review the reasons for and effect of that allocation to ensure that it has not had and will not have an impact adverse to the interests of the class. *See, e.g., Lewis v. Teleprompter Corp.,* 88 F.R.D. 11 (S.D.N.Y. 1980). What are the dangers of a fee-splitting agreement such as that of the PMC?

Most important, an agreement of this kind may create an incentive toward early settlement that may not be in the interests of the class. An attorney who is promised a multiple of funds advanced will receive the same return whether the case is settled today or five years from now. An early settlement will maximize the investor's profit, because he or she then can reinvest the funds elsewhere immediately. A lawyer in this situation might not negotiate as hard or might decide to settle early, when holding out for a higher settlement or going to trial would be in the

best interests of the class. *See generally* Coffee, The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation, Law & Contemp. Probs., Summer 1985, at 5.

The court's responsibility under Rule 23(e) for approval of a class action settlement limits to some extent the effect of this potential incentive for premature settlement. Before approving a class action settlement, a court must find it fair, reasonable and adequate, based on a detailed analysis of the law and facts. *See, e.g., In re "Agent Orange" Product Liability Litigation,* 597 F.Supp. 740, 758-63 (E.D.N.Y. 1984). The court, however, cannot make a precise determination of the fairness of the settlement; its task is to decide whether the agreed upon settlement falls within "the range of reasonableness." *Id.,* 597 F.Supp. at 762. Thus the court's approval process may not completely eliminate the more subtle effects of undue pressure on attorneys toward settlement.

In some cases any incentive to settle early will be counteracted by the incentive to prolong litigation created by the "lodestar" method of fee calculation. The lodestar formula rewards counsel based on the number of hours reasonably spent on a case and permits a court to award risk-of-litigation and quality-of-representation multipliers for time spent (but not expense incurred). It thus encourages attorneys to seek higher fees by delaying settlement and spending more time on a case. *See In re "Agent Orange" Product Liability Litigation,* 611 F.Supp. 1296, 1305-1306 (E.D.N.Y. Jan. 7, 1985, as modified June 18, 1985).

In the instant case, the theoretical incentive to settle early appears not to have been an appreciable factor in inducing settlement. It is clear that the class action settlement was

neither premature nor ill-considered, being in the best interests of the class. *Compare In re "Agent Orange" Product Liability Litigation,* 597 F.Supp 740 (E.D.N.Y. 1984) (fairness of proposed settlement) *with id.,* 611 F.Supp. 1223 (E.D.N.Y. 1985) (granting summary judgment in the cases of veterans who opted out of the class action). Based on the court's direct observation of counsel, the litigation and settlement negotiations, there is no reason to believe that the existence of the PMC's fee-sharing agreement had any appreciable untoward effect on the decision to settle. Moreover, any incentive to settle would have been counteracted by the lodestar-created incentive to prolong litigation. Here, all nine PMC members worked on the case; only three invested funds without expending extensive productive hours on behalf of the class.

A number of other considerations, though not dispositive, favor giving effect to the PMC's fee-splitting agreement. First, it results in no greater expense than the class otherwise would have borne. The profit will be paid by those members of the PMC who did the work.

Second, law is a business and within limits of public policy such as those set by professional ethics and the usury laws, lawyers may make their own business arrangements as do other business people. No usury is involved *inter se* in this joint venture; the funds advanced were investments, not loans that had to be repaid. A court is not in a good position to review this kind of consensual fee allocation. It lacks detailed knowledge about how lawyers usually structure business relationship among themselves.

Third, there is great doubt that the money to fund the litigation could have been obtained on more favorable terms. A similar arrangement with nonlawyer investors probably would have violated professional ethics. *See*

Code DR 3-102(A) (lawyer shall not share fees with nonlawyer); Model Rule 5.4(a) (same); San Francisco Bar Ass'n Legal Ethics Comm. Op. 1981-1 (Nov. 29, 1981) (prohibiting contingent reimbursement arrangement with nonlawyer lender), *summarized in* ABA/BNA Lawyers' Manual on Professional Conduct 801:1851 (1984). Here financing was by lawyers expected to lend their professional skills as well as advance their money. In the absence of adequate financing, the case might well have collapsed, and neither the class nor the attorneys who worked on their behalf would have received anything.

Fourth, a significant profit could have been earned by investing the funds conventionally. This factor must be considered in evaluating the reasonableness of the threefold return promised here. In December 1983 the PMC attorneys entered into their original fee-sharing agreement, retroactive to October 1983. It called for a substantial advance from each PMC member except Messrs. Dean, Schlegel and Musslewhite. Interest rates for conventional investments were then high. The length of time that the Agent Orange case would take to litigate and its outcome both were uncertain. The investing attorneys could have reasonably expected to receive a significant return on their capital through reasonably safe alternative investments—perhaps 50 to 100 percent—over the same time period that their money was to be invested in the Agent Orange litigation. Thus at the time that the attorneys committed themselves to making these advances, the expected extra "profit" was significantly less than the agreed upon total interest of 200 percent, being perhaps 100 to 150 percent above the interest they otherwise probably could have earned in less risky enterprises.

Finally, it should be noted that, had the PMC received the roughly $30 million in fees and expenses that it sought

in its original fee application, the extra profit to the money suppliers would not have given them an appreciable relative advantage over those who did most of the legal work.

The parties agree that the original agreement was made freely, without duress or coercion. No PMC member protested when the agreement was renegotiated. All else being equal, these factors suggest giving "deference to the parties' contractual agreements" if possible. *Dunn v. H.K. Porter Co., Inc.,* 602 F.2d 1105, 1111 (3d Cir.1979). *See also In re Ampicillin Antitrust Litigation,* 81 F.R.D. 395, 400 (D.D.C.1978).

The practical need for financing in complex litigation renders undesirable an ironclad rule prohibiting such agreements in all cases on the basis of a potential for harmful conflict of interest. If arrangements of this kind were banned outright attorneys might be dissuaded from financing risky but meritorious class litigation in the future. A case-by-case examination of such fee-sharing agreements best balances this potential chilling effect against the need to safeguard the interests of the class and professional values.

Different arrangements may call for different treatment. The agreement now before the court, for example, differs from that originally entered into by the PMC attorneys. The original agreement provided for a *pro rata* sharing of 50 percent of the amount of pooled fees remaining after the investing lawyers were paid their threefold return. Such an arrangement not only further distorts the court allocation of fees; it also tends to reward a lawyer who puts in neither funding nor substantial productive efforts. Whether a flat rule against provisions of this kind would be appropriate need not be decided here.

VI. EARLY FEE DISCLOSURE RULE IN FUTURE CASES

The most troubling aspect of the agreement before the court is the failure of the PMC to reveal its existence until very late in the litigation. Because class attorneys have special fiduciary obligations to the class, and because the court has a responsibility to protect the rights of the class, the class and the court have a right to know about any agreements among counsel for allocating fees payable from a class recovery. In view of the lack of a personal relationship between most class members and the attorneys representing them it is essential that this information be available through the court. Class actions are public or quasi-public in nature. Rule 23 of the Federal Rules of Civil Procedure serves in many respects as a "sunshine" law in its requirements of notice to the class and public hearings. The public and press must have full access to information about this kind of fee-sharing arrangement so that an opportunity is afforded for comment and objection.

In future cases, *as soon as a fee-sharing arrangement is made its existence must be made known to the court,* and through the court to the class. Subsequent modifications if any also must be reported promptly to the court.

Whether the expense of a separate notification to members of the class is warranted will be a matter for the court to consider in connection with each case's needs. Here the size of the class would have made a separate notification inappropriate. The press, however, could have been counted on to spread the word so that interested leaders of the bar and veterans community might have been informed. When notice was ultimately given to the class the fee arrangement notification could have been incorporated in the communication to the class. *See* S.D.N.Y. & E.D. N.Y.Civ.R. 5(a).

A rule requiring early disclosure will have a number of advantages. First, the court at the outset can determine whether to permit the fee allocation agreement to stand before any attorney invests substantial time and funds. Post hoc second-guessing, detriment to individual lawyers and acrimony among counsel will be avoided. *Cf. DiFilippo v. Morizio,* 759 F.2d 231, 234 (2d Cir. 1985) (decision about merits of case for calculation of fee award must be *ex ante* determination, not based on hindsight afforded by ultimate result).

Second, information on internal financial arrangements will help the court make an informed decision about which lawyers should be permitted to manage the litigation and about whether and under what conditions a class should be certified. Courts have the power to appoint and replace class counsel. *See, e.g.,* Fed.R.Civ.P. 23(d)(3); *Cullen v. New York State Civil Service Commission,* 435 F.Supp. 546, 563-64 (E.D.N.Y.), *appeal dismissed,* 566 F.2d 846, 848-49 (2d Cir. 1977); *Percodani v. Riker-Maxson Corp.,* 51 F.R.D. 263 (S.D.N.Y. 1970), *aff'd sub nom. Farber v. Riker-Maxson Corp.,* 442 F.2d 457 (2d Cir.1971). *Cf., e.g., Vincent v. Hughes Air West, Inc.,* 557 F.2d 759, 744 (9th Cir. 1977) (upholding court's power to appoint lead counsel in nonclass action setting); *In re Air Crash Disaster at Florida Everglades on December 29, 1972,* 549 F.2d 1006, 1012 & n. 8, 1014-15 (5th Cir. 1977) (same); *MacAlister v. Guterma,* 263 F.2d 65, 68-69 (2d Cir. 1958) (same). A court might well base a decision about which attorneys will best represent the class in part on the lawyers' fee allocation arrangements.

When a case can proceed as a class action only if financial agreements of the kind adopted by the PMC are made, the court may deem this a factor to be weighed against class

certification. *Cf.* Fed.R.Civ.P. 23(a)(4). Alternatively, class members might choose to decline representation by class counsel under such conditions by opting out of the class action and proceeding individually or as a separate subclass. *See* Fed.R.Civ.P. 23(d).

The court when informed of the fee allocation arrangement could require that it be restructured to minimize inappropriate incentives. *See id.* For example, an agreement for a multiplied repayment of funds advanced might be modified to provide instead for an annual rate of return, with a maximum total return. Such an arrangement would tend to decrease the investing attorney's improper incentive to settle early. At the same time it would provide a cap on the total repayment to minimize the noninvesting attorney's incentive to settle to avoid an obligation to pay cumulative annual interest that might become onerous in a lengthy litigation.

A reporting requirement could be separately imposed by court order at the beginning of each litigation. *See, e.g., In re Equity Funding Corp. of America Securities Litigation,* 438 F.Supp. 1303, 1323 (C.D.Cal.1977); Manual for Complex Litigation § 1.47, Sample Order (alternative 2) ¶¶ 4, 5 (5th ed. 1982). A fixed rule requiring disclosure in every class action, however, is more desirable than issuance of an order in each case. *See Lewis v. Teleprompter Corp.,* 88 F.R.D. 11, 17 (S.D.N.Y.1980) (objecting to fee agreements "concealed from the court and not disclosed until consideration of the application for fee awards was well under way").

For the reasons explicated above, power to interpret Rule 23 entails by implication the responsibility of a trial court to establish a decisional rule demanding early revelation of fee sharing arrangements to aid in carrying out responsi-

bilities under Rule 23. The Advisory Committee on Civil Rules of the Judicial Conference of the United States may wish to consider amending Rule 23 to incorporate an explicit disclosure requirement in order to forewarn class attorneys.

The local Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York already require disclosure of attorney fee allocation agreements in class actions when notice of fee applications is given to the class:

> Fees for attorneys or others shall not be paid upon the recovery or compromise in a derivative or class action on behalf of a corporation or class except as allowed by the court after a hearing upon such notice as the court may direct. The notice shall include a statement of the names and addresses of the applicants for such fees and the amounts requested respectively and *shall disclose any fee sharing agreements with anyone.* The court, in its discretion, may direct that the notice also be given the New York Regional Office of the Securities and Exchange Commission. Where the court directs notice of a hearing upon a proposed voluntary dismissal or settlement of a derivative or class action, the above information as to the applications shall be included in the notice.

S.D.N.Y. & E.D.N.Y.Civ.R. 5(a) (emphasis added). This Rule 5(a) notice is given late in the litigation, after settlement or other disposition.

The fee application notice requirements of Local Rule 5(a) were waived in this class action "because of the need for continued intensive work by the attorneys until the close of the fairness hearings and because of the complexity of

the fee applications." Notice of Proposed Settlement of Class Action, p. 7, *reprinted in In re "Agent Orange" Product Liability Litigation,* 597 F.Supp. 740, 869 (E.D. N.Y. 1984). At the time the court allowed this waiver it was unaware of the existence of the PMC's fee-sharing arrangement.

Disclosure of a fee-sharing agreement at the beginning of every class action is preferable to disclosure after settlement on application for attorney fees. Based on the Agent Orange PMC agreement problems, the Board of Judges of the United States District Court for the Eastern District of New York has unanimously agreed at one of its regular monthly meetings that Local Rule 5 should be modified to require early notice. This amendment will minimize fee-sharing problems in future litigations.

Appropriate steps in amending Local Rule 5 will be taken, preferably in concert with the United States District Court for the Southern District of New York, so that the uniformity of the joint Southern-Eastern District local rules is preserved. Regardless of any amendment to Local Rule 5, in the future full disclosure of fee-sharing arrangements will be required at the outset in any class action filed in this district. Any modification in such arrangements must be promptly brought to the court's attention.

VII. CONCLUSION

The petition to compel arbitration is dismissed. The motion to set aside the PMC's fee-sharing agreement as renegotiated is denied. The Clerk of the Court is directed to forward copies of this memorandum and order to the parties. No costs or disbursements are granted.

SO ORDERED.